No. 15-1191

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| Title: | Loretta E. Lynch, Attorney General, Petitioner<br>v.<br>Luis Ramon Morales-Santana |
| Docketed: | March 22, 2016 |
| Linked with 15A858 | |
| Lower Ct: | United States Court of Appeals for the Second Circuit |
| Case Nos.: | (11-1252) |
| Decision Date: | October 30, 2015 |
| Rehearing Denied: | December 1, 2015 |

**Questions Presented**

| ---Date--- | ------Proceedings and Orders---------- |
|---|---|
| Feb 12 2016 | Application (15A858) to extend the time to file a petition for a writ of certiorari from February 29, 2016 to March 30, 2016, submitted to Justice Ginsburg. |
| Feb 16 2016 | Application (15A858) granted by Justice Ginsburg extending the time to file until March 30, 2016. |
| Mar 22 2016 | Petition for a writ of certiorari filed. (Response due April 21, 2016) |
| Apr 11 2016 | Order extending time to file response to petition to and including May 23, 2016. |
| May 17 2016 | Letter dated May 17, 2016, from the Solicitor General received notifying the Court of an error in the petition appendix. |
| May 23 2016 | Brief of respondent Luis Ramon Morales-Santana in opposition filed. |
| Jun 7 2016 | DISTRIBUTED for Conference of June 23, 2016. |
| Jun 7 2016 | Reply of petitioner Loretta E. Lynch, Attorney General filed. (Distributed) |
| Jun 27 2016 | DISTRIBUTED for Conference of June 27, 2016. |
| Jun 28 2016 | Petition GRANTED. |
| Aug 1 2016 | Motion to dispense with printing the joint appendix filed by petitioner Loretta E. Lynch, Attorney General. |
| Aug 4 2016 | The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 19, 2016. |
| Aug 4 2016 | The time to file respondent's brief on the merits is extended to and including September 26, 2016. |
| Aug 19 2016 | Brief of petitioner Loretta E. Lynch, Attorney General filed. |
| Sep 2 2016 | SET FOR ARGUMENT On Wednesday, November 9, 2016 |
| Sep 7 2016 | Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner. |
| Sep 9 2016 | Record has been requested from the U.S.C.A. 2nd Circuit. |
| Sep 15 2016 | Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent. |
| Sep 15 2016 | Record received from the U.S.C.A. 2nd Circuit is electronic. |
| Sep 26 2016 | Brief of respondent Luis Ramon Morales-Santana filed. |
| Sep 28 2016 | CIRCULATED |

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|---|---|
| Sep 30 2016 | Brief amici curiae of The American Civil Liberties Union, et al. filed. (Distributed) |
| Oct 3 2016 | Motion to dispense with printing the joint appendix filed by petitioner GRANTED. |
| Oct 3 2016 | Brief amici curiae of Constitutional Law, Federal Courts, Citizenship, and Remedies Scholars filed. (Distributed). |
| Oct 3 2016 | Brief amici curiae of Professors of History, Political Science, and Law filed. (Distributed) |
| Oct 3 2016 | Brief amici curiae of Equality Now, et al. filed. |
| Oct 3 2016 | Brief amici curiae of The National Immigrant Justice Center, et al. filed. (Distributed) |
| Oct 3 2016 | Brief amicus curiae of Population and Family Scholars filed. (Distributed) |
| Oct 3 2016 | Brief amici curiae of Scholars on Statelessness filed. (Distributed) |
| Oct 26 2016 | Reply of petitioner Loretta E. Lynch, Attorney General filed. (Distributed) |
| Nov 9 2016 | Argued. For petitioner: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondent: Stephen A. Broome, Los Angeles, Cal. |
| Nov 15 2016 | Record received from the Board of Immigration Appeals is electronic. |
| Nov 16 2016 | Letter from counsel for petitioner received and distributed. |

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15-1191

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No.

# In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

*v.*

LUIS RAMON MORALES-SANTANA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In order for a United States citizen who has a child abroad with a non-U.S. citizen to transmit his or her citizenship to the foreign-born child, the U.S.-citizen parent must have been physically present in the United States for a particular period of time prior to the child's birth. The questions presented are:

1. Whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment's guarantee of equal protection.

2. Whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.

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# In the Supreme Court of the United States

No.

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

*v.*

LUIS RAMON MORALES-SANTANA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-41a) is reported at 804 F.3d 520. The decisions of the Board of Immigration Appeals (App., *infra*, 42a-44a) and of the immigration judge (App., *infra*, 45a-49a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 8, 2015, and amended on October 30, 2015. A petition for rehearing was denied on December 1, 2015 (App., *infra*, 1a-2a). On February 16, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March

30, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are reproduced in the appendix to this petition. App., *infra*, 50a-54a.

## STATEMENT

1. This case involves the constitutionality of the statutory provisions governing when a child born abroad out of wedlock is granted U.S. citizenship at birth. Article I of the United States Constitution assigns to Congress the "Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Pursuant to that authority, Congress has conferred U.S. citizenship at birth on certain persons born outside of the United States or its outlying possessions through various provisions in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* The rules Congress enacted are designed to assure that persons who are granted U.S. citizenship have, through their legally recognized U.S.-citizen parents, what Congress determined to be a sufficient connection to the United States to warrant conferral of U.S. citizenship at birth.

At the time of respondent's birth in 1962, App., *infra*, 6a, a child born outside the United States to married parents, both of whom were U.S. citizens, was declared by the INA to be a U.S. citizen if one of his parents had a residence in the United States of any duration prior to the child's birth. 8 U.S.C.

1401(a)(3).[1] The rule was different if only one of the child's married parents was a U.S. citizen. In that situation, there was only one legally recognized parent through whom the child could establish the requisite connection to the United States, and there was, moreover, a competing claim of connection to another country—the country of which the child's other parent was a citizen. The 1952 version of the INA accordingly provided that when a child was born abroad to married parents only one of whom was a U.S. citizen, the child was declared to be a U.S. citizen only if, before the child's birth, the U.S.-citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned 14 years of age. 8 U.S.C. 1401(a)(7).[2]

While 8 U.S.C. 1401 governed the granting of U.S. citizenship to children born abroad to married parents, 8 U.S.C. 1409 governed the granting of citizenship to children born abroad out of wedlock. Section

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[1] Unless otherwise noted, all references in the text to 8 U.S.C. 1401 and 1409 are to the 1958 edition of the United States Code, the version of the relevant naturalization provisions of the INA in effect when respondent was born. Section 1401 has since been amended. Immigration and Nationality Act Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3657. Those amendments do not apply unless the child was born on or after November 14, 1986, however, and thus do not govern respondent's citizenship claim. See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2619.

[2] In the 1986 amendments, Congress reduced the term of the required physical presence in the United States to a total of five years, two of which must be after the parent turned 14. 1986 Act § 12, 100 Stat. 3657, redesignated as 8 U.S.C. 1401(g). As pointed out in note 1, *supra*, that amendment applies only to children born after the effective date of those amendments.

1409(a) stated a general rule that specified provisions of Section 1401(a)—including paragraphs (a)(3) and (7), discussed above—shall apply to a child born out of wedlock on or after the effective date of the 1952 Act if the paternity of the child was established "by legitimation" while the child was under age 21. 8 U.S.C. 1409(a). In other words, Section 1409(a) provided that if the child was legitimated before he reached 21, he was declared to be a U.S. citizen as of the date of his birth subject to the same conditions as if his parents had been married at the time of his birth. Thus, if both parents were U.S. citizens, even though unmarried at the time of the child's birth, it was sufficient that one of the parents had a residence in the United States of any duration prior to the child's birth. But if only one of the two parents was a U.S. citizen, that parent must have been physically present in the United States for a period totaling at least ten years, at least five of which were after attaining the age of 14, for the child to be a U.S. citizen pursuant to Section 1409(a). *Nguyen* v. *INS*, 533 U.S. 53, 59-73 (2001) (discussing current version of Section 1409(a), requiring, *inter alia*, that paternity be established while the child was under age 18).[3]

Section 1409(c) created an additional basis for the granting of citizenship to a child born out of wedlock abroad. It provided that, notwithstanding 8 U.S.C. 1409(a), such a child shall be a U.S. citizen if the mother was a U.S. citizen and the mother had previ-

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[3] Section 1409(a) was amended in 1986 to revise the requirements that must be satisfied for a child born abroad out of wedlock to obtain citizenship through a U.S.-citizen father. 1986 Act § 13(b), 100 Stat. 3657; *Miller* v. *Albright*, 523 U.S. 420, 468 (1998) (Ginsburg, J., dissenting).

ously been physically present in the United States for a continuous period of one year. 8 U.S.C. 1409(c). That rule reflected the reality that when a child is born out of wedlock, there ordinarily is only one legally recognized parent—the mother—at the time of birth. Where the mother was a U.S. citizen, Congress determined that the mother's one year of continuous physical presence in the United States prior to the child's birth abroad was sufficient to create the requisite connection to the United States.

Section 1409(c) also addressed the situation that would arise if the alien father later legitimated a child who had been granted U.S. citizenship at birth based on his mother's one year of continuous presence in the United States prior to his birth. If the ten- and five-year physical-presence requirements in Section 1401(a)(7) were applicable through Section 1409(a) in that situation—because there were two parents, only one of whom was a U.S. citizen—the child would have been *divested* of the U.S. citizenship he had obtained at birth unless the mother also satisfied the ten- and five-year physical-presence requirements in Section 1401(a)(7). Section 1409(c) made clear that such a divestment would not occur by providing that such a child was a U.S. citizen at birth "[n]otwithstanding the provision of subsection (a)"—*i.e.*, notwithstanding the legitimation of the child by the father before the child reached age 21. 8 U.S.C. 1409(c).

2. a. In 1962, respondent was born in the Dominican Republic to unmarried parents. App., *infra*, 6a. Respondent's mother was a citizen of the Dominican Republic. *Ibid.* At the time of respondent's birth, his father was a U.S. citizen who had not spent more than five years in the United States or a U.S. possession

after his 14th birthday. *Ibid.* Respondent's father legitimated respondent when he married respondent's mother in 1970, before respondent turned age 21. *Ibid.* Respondent was admitted to the United States as a lawful permanent resident in 1975. *Ibid.* Respondent's father died in 1976. *Ibid.*

In 1995, respondent was convicted of burglary in the first degree, two counts of robbery in the second degree, four counts of attempted murder, and criminal possession of a weapon in the second degree. App., *infra*, 46a. In 2000, respondent was placed in removal proceedings, where he admitted that he was removable as an alien who had committed aggravated felonies and a firearms offense. *Id.* at 45a-46a. The immigration judge denied his applications for asylum and protection from removal and ordered him removed from the United States. *Id.* at 47a-49a. Respondent filed motions for reconsideration and to reopen, see *id.* at 42a (noting that respondent's motion was "number-barred"), claiming for the first time in the final such motion that he was a U.S. citizen by virtue of his father's U.S. citizenship. *Id.* at 8a, 42a-44a. The Board of Immigration Appeals (BIA) denied that motion in 2011 on the ground that his father had not satisfied the physical-presence requirement in 8 U.S.C. 1401(a)(7). App., *infra*, 42a-44a.

b. Respondent petitioned for review of the BIA's decision in the United States Court of Appeals for the Second Circuit. The court of appeals first considered and rejected respondent's statutory arguments that he was a U.S. citizen from birth under 8 U.S.C. 1401. App., *infra*, 8a-14a. The court went on, however, to hold that the statutory scheme governing whether a child who was born abroad out of wedlock to one U.S.-

citizen parent and one alien parent was a U.S. citizen at birth violates the equal protection rights of respondent's U.S.-citizen father. *Id.* at 14a-41a.

Applying intermediate scrutiny, App., *infra*, 16a-20a, the court agreed with the government that its two asserted interests—ensuring a sufficient connection between a child born abroad and the United States, and avoiding statelessness—are important government interests, *id.* at 21a-26a. But the court concluded that neither interest was advanced by the challenged statutory scheme. *Id.* at 21a-34a. The court held that, although the government's interest in ensuring that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship justifies imposing a physical-presence requirement on such a child's parent or parents, it does not justify imposing a different physical-presence requirement when a child's unwed mother is a U.S. citizen. *Id.* at 21a-25a. The court also rejected the government's argument that Congress opted to impose a different physical-presence requirement on unwed U.S.-citizen mothers in order to reduce statelessness. *Id.* at 25a-32a. The court further held that, even if that had been Congress's purpose, its pursuit of that goal failed to satisfy intermediate scrutiny because, in the court's view, gender-neutral means of serving that interest were available. *Id.* at 32a-34a. The court acknowledged that its ruling conflicts with the Ninth Circuit's decision in *United States* v. *Flores-Villar*, 536 F.3d 990, 997 (2008), aff'd by an equally divided Court, 564 U.S. 210 (2011) (per curiam). App., *infra*, 22a, 34a n.17.

As a remedy for the equal protection violation it found, the court of appeals declared that respondent

"is a citizen [of the United States] as of his birth." App., *infra*, 41a. The court relied on the INA's severability provision to extend what it viewed as the "less onerous" one-year continuous-physical-presence requirement to unwed U.S.-citizen fathers (but not to married U.S.-citizen mothers or fathers), *id.* at 36a, rejecting the government's argument that the proper remedy would be to extend to unmarried U.S.-citizen mothers the ten- and five-year physical-presence requirements that otherwise apply when a child is born abroad and only one parent is a U.S. citizen, *id.* at 35a-41a.

## REASONS FOR GRANTING THE PETITION

The Second Circuit erroneously declared an important provision of an Act of Congress to be unconstitutional in a decision that creates an acknowledged circuit conflict. The court of appeals further erred when it remedied the perceived constitutional violation by granting citizenship to respondent without constitutional or statutory authority to do so. Review by this Court is warranted to correct the court of appeals' errors and to reinstate the uniform national rules Congress enacted for the acquisition of U.S. citizenship by children born abroad out of wedlock to parents only one of whom was a U.S. citizen at the time of the child's birth. This Court previously granted a petition for a writ of certiorari presenting the same questions, even in the absence of a circuit split, and in a case in which the constitutionality of the Act of Congress had been upheld by the court of appeals. *Flores-Villar* v. *United States*, 564 U.S. 210 (2011) (per curiam) (affirming by an equally divided Court). A fortiori, review is warranted here.

### A. The Court Of Appeals Erred In Holding That The Challenged Statutory Provisions Violate The Equal Protection Component Of The Fifth Amendment's Due Process Clause

In considering respondent's constitutional challenge to the statutes that govern the granting of U.S. citizenship to a child born abroad to one U.S.-citizen parent and one alien parent, the court of appeals applied the wrong level of scrutiny, discounted important government interests, and erroneously concluded that the distinctions in the challenged scheme are based on congressional stereotypes about gender roles. Review by this Court is warranted to correct the court of appeals' erroneous holding that the difference in physical-presence requirements in Sections 1401 and 1409 are unconstitutional.

1. The court of appeals erred in refusing to apply rational-basis review when considering respondent's constitutional challenge. As this Court has long held, the Fourteenth Amendment to the Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). Although "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, * * * [a] person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty * * * or by authority of Congress." *Id.* at 702-703. There is no dispute in this case that respondent was born outside the United States and is therefore not entitled—as a constitutional matter—to citizenship by virtue of his birth. Instead, he asserts a right to the "acquisition of citizenship by being born abroad of an American par-

ent," which is "obviously" not governed by the Fourteenth Amendment. *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971) (quoting *Wong Kim Ark*, 169 U.S. at 688).

Article I of the Constitution vests in Congress the authority "To establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4; see *Wong Kim Ark*, 169 U.S. at 688. Authority over naturalization is thus "vested exclusively in Congress" by the Constitution. *Wong Kim Ark*, 169 U.S. at 701. That authority encompasses both the power to grant citizenship to children who are born abroad of U.S.-citizen parents *and* the power not to do so. With respect to citizenship through naturalization, respondent is bound by the rules established by Congress. See *Bellei*, 401 U.S. at 828 (noting that "naturalization by descent" is "dependent * * * upon statutory enactment").

Decisions about what classes of persons are eligible for statutory citizenship are quintessentially legislative determinations. The Naturalization Clause reflects the fundamental proposition, inherent in sovereignty, that "[e]very society possesses the undoubted right to determine who shall compose its members." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893) (citation omitted). The power to confer or deny citizenship on individuals born abroad—individuals who are "alien[s] as far as the Constitution is concerned"—is also an aspect of the power to exclude aliens from the Nation. *Miller* v. *Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring in the judgment). And the United States' "policy toward aliens" is "vitally and intricately interwoven with * * * the conduct of foreign relations," a power that likewise is vested in the political Branches. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

Although the Judiciary has a crucial role in protecting rights accorded under the Constitution to persons who have been granted citizenship by the Fourteenth Amendment or by Congress, and to those aliens who are in the United States, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

As this Court explained in *Plyler* v. *Doe*, 457 U.S. 202 (1982), "Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." *Id.* at 225. That principle of deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo* v. *Bell*, 430 U.S. 787, 792, 793 n.4 (1977) (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)). Accordingly, Congress's judgments regarding the requirements that must be satisfied in order for a child born abroad to acquire his parent's U.S. citizenship are entitled to great deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for those judgments. *Id.* at 794 (citation omitted).

The court of appeals erred in declining to adhere to the principle, reaffirmed most authoritatively in *Fiallo*, that courts accord deference to congressional

action in this area. The court of appeals declined to follow *Fiallo* because that case concerned "Congress's 'exceptionally broad power' to admit or remove non-citizens." App., *infra*, 17a (quoting *Fiallo*, 430 U.S. at 794). But the power to grant citizenship (or not) to individuals born abroad is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is an aspect of the same power. In any event, the plaintiffs in *Fiallo* included U.S. citizens, 430 U.S. at 790 n.3, who unsuccessfully argued that rational-basis review should not apply because the statutory provision at issue implicated "constitutional interests of United States citizens and permanent residents." *Id.* at 794 (citation omitted). If rational-basis review applied to the constitutional claims of citizens in *Fiallo*, it should apply to respondent's constitutional claim as well.[4]

2. The court of appeals also erred in holding that the statutory scheme could not pass constitutional muster under intermediate scrutiny. The physical-presence requirements set forth in Sections 1401 and 1409 do not violate equal protection because they are substantially related to important government interests.

a. The court of appeals correctly acknowledged that Congress has an important interest in ensuring

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[4] The court of appeals also justified its application of heightened scrutiny by contending that seven Justices in *Miller* v. *Albright*, *supra*, would have applied heightened scrutiny to review a similar gender-based equal protection challenge to a related provision of the INA. App., *infra*, 18a-19a. That reasoning is flawed, however, because this Court expressly stated in its later decision in *Nguyen* v. *INS*, 533 U.S. 53, 61 (2001), that it was *not* deciding whether heightened scrutiny should apply to such a challenge in the immigration and naturalization context.

that foreign-born children of parents of different nationalities have a sufficient connection to the United States, through their U.S.-citizen parent, to warrant U.S. citizenship at birth. App., *infra*, 21a. This Court in *Nguyen* v. *INS*, 533 U.S. 53 (2001), recognized that Congress has a legitimate "desire to ensure some tie between this country and one who seeks citizenship." *Id.* at 68. The court of appeals dismissed that interest, however, because it believed that "unwed mothers and fathers are similarly situated with respect to how long they should be present in the United States or an outlying possession prior to [a] child's birth in order to have assimilated citizenship-related values to transmit to the child." App., *infra*, 24a (emphases omitted). The court of appeals was mistaken.

The imposition of a physical-presence or residence requirement on *all* U.S.-citizen parents of children born abroad serves Congress's interest in ensuring a sufficient connection between those children and the United States.[5] The different presence requirements reflect the differing circumstances that Congress concluded required different measures for determining whether the child's legal ties to the United States were sufficiently strong to warrant a grant of U.S. citizenship—depending on whether there was one legally recognized parent or two, and whether, if two,

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[5] At the time of respondent's birth in 1962, a child born outside the United States to married parents, both of whom were U.S. citizens, could acquire citizenship through either of his U.S.-citizen parents if, before the child's birth, one of the parents "had a residence in the United States or one of its outlying possessions." 8 U.S.C. 1401(a)(3). Section 1401 has since been amended, with former Section 1401(a)(3) redesignated as Section 1401(c). Act of Oct. 10, 1978, Pub. L. No. 95-432, § 3, 92 Stat. 1046.

one of them was an alien who would owe allegiance to another country. For example, where both legally recognized parents were U.S. citizens, the child's legal ties to the United States were especially strong and there was likely no competing claim of a legal connection to another country. In that situation, whether the parents were married at the time of the child's birth or the parents were unmarried but the father later legitimated the child, Congress required only that one of the two U.S.-citizen parents have had a residence in the United States at some point prior to the child's birth. See 8 U.S.C. 1401(a)(3), 1409(a).[6]

By contrast, at the time of respondent's birth, when there were two legally recognized parents but only one was a U.S. citizen, the general rule was that the U.S.-citizen parent (married or unmarried) had to satisfy a physical-presence requirement of ten years (in the aggregate) prior to the birth of the child, at least five of which had to be after the parent was 14 years old. Section 1409(c), however, adopted a different physical-presence requirement (one year of continuous physical presence) when the mother was a U.S. citizen and unwed. When a child was born out of wedlock, the mother typically was the only legally recognized parent at the time of birth. There accordingly was no competing claim of a connection to another country through a legally recognized alien parent. In that situation, Congress concluded that the

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[6] Indeed, that rule was more lenient than the rule applicable under 8 U.S.C. 1409(c) at the time of the child's birth if the mother (who would typically have been the only legally recognized parent) was a U.S. citizen. Under Section 1409(c), the new-born child was granted citizenship only if the mother had been continuously present in the United States for one year.

requirement of one year of continuous physical presence for the mother created a sufficient connection between the United States and the child to warrant the conferral of citizenship on the child at birth. Section 1409(c) also made explicit that a child granted U.S. citizenship at birth would not be divested of that citizenship in the event that the alien father later legitimated the child at some point over the ensuing 21 years: It provided that the conferral of citizenship shall apply "[n]otwithstanding" the general rule of the ten- and five-year physical-presence requirements under Sections 1409(a) and 1401(a)(7) when, following legitimation of the child by an alien father, there were two legally recognized parents.

Respondent's circumstances present the reverse situation. When he was born out of wedlock in the Dominican Republic, his mother—his only legally recognized parent—was *not* a U.S. citizen, and respondent therefore had no legally recognized connection to the United States *at all*. At the time of his birth (*i.e.*, before legitimation by the marriage of his parents), respondent therefore had no claim of U.S. citizenship. When respondent's U.S.-citizen father later legitimated respondent by marrying respondent's mother, respondent then had two legal parents, one of whom remained an alien. The general rule in Sections 1409(a) and 1401(a)(7) for the two-parent situation therefore applied. Respondent's father thus was not similarly situated to a U.S.-citizen mother of a child born out of wedlock abroad, either when respondent was born or when his father later married his mother. A U.S.-citizen mother, at the time of her child's birth, would have been a legally recognized parent and the only such parent, and there according-

ly would have been no competing claim of a connection to a foreign country. By contrast, when respondent was born, he had no legal relationship to the U.S.-citizen father who later legitimated him, and therefore no legal relationship to the United States; and when his father *did* later legitimate him and thereby established a legal relationship with him for the first time, there were then *two* legal parents, each with a different nationality. It was entirely reasonable for Congress to conclude that in that situation, assurance of a sufficient connection to the United States called for application of the general rule requiring ten- and five-years of physical presence in the United States by the U.S.-citizen parent that is applicable even to mixed-nationality *married* couples.

Because the U.S.-citizen mother and father—and their children—were therefore not similarly situated, the separate provision in Section 1409(c) for granting citizenship to the child of a U.S.-citizen mother who had been physically present in the United States for a continuous period of one year prior to the child's birth does not violate equal protection, even under intermediate scrutiny. And preserving the U.S. citizenship of the child born abroad to the unwed U.S.-citizen mother, once granted at birth, even if the child was later legitimated by his alien father, plainly advances a substantial governmental interest and fully justifies the differing physical-presence requirements. See *Heckler* v. *Mathews*, 465 U.S. 728, 745-750 (1984).

b. The statutory provisions also serve a second important interest, *viz.* reducing the risk that a child would be stateless at birth.[7] Although the court of

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[7] The physical-presence requirements applicable to respondent's case were adopted in 1952. Between Congress's overhaul of na-

appeals acknowledged that reducing the risk of statelessness at birth is an important government interest, it cited three bases—all erroneous—on which to conclude that such an interest does not justify the statutory scheme Congress enacted. App., *infra*, 25a-34a.

First, the court erred in rejecting the government's contention that Congress's decision to impose a shorter (but continuous) physical-presence requirement on unmarried U.S.-citizen mothers was in fact motivated by a desire to reduce the risk of statelessness. App., *infra*, 26a-32a. The Senate Report on the 1952 version of the INA addressed the provisions that prescribe who qualifies as a U.S. citizen at birth. S. Rep. No. 1137, 82d Cong., 2d Sess. 38-39 (1952) (Senate Report). The Report noted that the 1952 revisions to the then-existing nationality laws were not as extensive as the 1940 revisions that adopted the then-existing naturalization laws, see Nationality Act of 1940 (1940 Act), ch. 876, 54 Stat. 1137—but noted that "new conditions brought on by World War II and the postwar era have required a reappraisal and a

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tionality laws in 1940 and its adoption of the INA in 1952, children born abroad to an unmarried U.S.-citizen mother and an alien father acquired the nationality of the mother if the mother had ever resided in the United States for *any* period, unless the father legitimated before the age of majority. Nationality Act of 1940, ch. 876, Tit. I, ch. II, § 205, 54 Stat. 1139-1140. By imposing a one-year continuous-physical-presence requirement on unmarried mothers for the first time in 1952, INA, ch. 477, Tit. III, ch.1, § 309(c), 66 Stat. 239, Congress advanced its interest in ensuring a substantial connection between a foreign-born child and the United States.

rewriting of the nationality laws of the United States." Senate Report 38.[8]

One of the revisions Congress enacted in 1952 was to make explicit that the conferral of citizenship based on the U.S.-citizen mother's physical presence in the United States—which Congress revised to require one year of continuous physical presence rather than merely a physical presence of any duration—would not be abrogated if the child were later legitimated by the alien father and if the U.S.-citizen mother did not satisfy the ten- and five-year physical-presence requirements applicable under Section 1409(a) when there were two legal parents. The text of the parallel provision of the 1940 Act could have been read to require abrogation of the child's U.S. citizenship in those circumstances,[9] although the BIA interpreted

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[8] Congress and the world became acutely aware of the problem of statelessness in the years during and following the First and Second World Wars. See, *e.g.*, United Nations, *A Study of Statelessness* 4-7 (1949); http://www.unhcr.org/3ae68c2d0.pdf; Hugh Massey, *UNHCR and* De Facto *Statelessness* 1-26 (2010), http://www.unhcr.org/4bc2ddeb9.pdf.

[9] Section 205 of the 1940 Act specified that Section 201(g)—which provided that a person born abroad to one U.S.-citizen parent and one alien parent would be a U.S. citizen from birth if his U.S.-citizen parent had resided in the United States for ten years prior to the child's birth, § 201(g), 54 Stat. 1139—would "apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court." § 205, 54 Stat. 1139. Section 205 went on to provide that, "*[i]n the absence of such legitimation or adjudication*, the child, * * * if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status." 54 Stat. 1140 (emphasis added).

that provision to preserve the child's citizenship in a decision shortly before the 1952 Act was passed. *Matter of M—*, 4 I. & N. Dec. 440, 442-445 (1951). The enactment of Section 1409(c) removed any ambiguity on that point. In explaining the purpose of that provision, the Senate Report directly addressed the issue of statelessness, stating: "This provision establishing the child's nationality as that of the [U.S.-citizen] mother regardless of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth.*" Senate Report 39 (emphasis added).

The court of appeals dismissed that clear statement of congressional purpose, stating: "Although the Report reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue." App., *infra*, 29a n.10. The court of appeals' reasoning is misguided. The Senate Report directly links the rule applicable to unmarried U.S.-citizen mothers of children born abroad to the purpose that such children "shall have a nationality at birth." Senate Report 39. If the 1952 Senate had anticipated this litigation, perhaps it would have been more expansive in its explanation of that connection—but its meaning is nevertheless clear. Congress imposed and preserved the shorter (but continuous) physical-presence requirement for unmarried U.S.-citizen mothers to "insure[]" that the children would have a nationality at birth and not be divested of it upon later legitimation by the father. *Ibid.*[10]

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[10] The congressional hearings leading to the 1940 overhaul of the nationality laws also included a survey of the citizenship laws of other nations; that survey revealed that in approximately 30

Second, the court of appeals erred in speculating that the physical-presence requirements "arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock," because the court was not persuaded "that the children of unwed citizen mothers faced a greater risk of statelessness than the children of unwed citizen fathers." App., *infra*, 30a-31a. That rationale ignores the fact that the child born out of wedlock of a U.S.-citizen father and the child born out of wedlock of a U.S.-citizen mother were not similarly situated as a legal matter either at the time of birth or at the time of legitimation, for the reasons given above. See pp. 13-16, *supra*. But in any event, the risk of statelessness at the time of birth was greater for children born abroad to an unwed U.S.-citizen mother than for those born to an unwed U.S.-citizen father because at the time Congress enacted a comprehensive naturalization code in 1940 (and substantially revised it in 1952), the laws of many *other* countries would not extend citizenship to such a child born in that country.

Unlike the United States, which affords citizenship on a "*jus soli*" basis to all who are born in the United States and subject to its jurisdiction, many other countries apply "*jus sanguinis*" rules, pursuant to

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nations, a child born out of wedlock acquired the citizenship of the mother (subject, in most but not all cases, to taking the citizenship of the father in the event of legitimation). *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 431 (1945); see Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-259 (1935).

which a child's citizenship is determined at birth through his blood relationship to a parent rather than with reference to his place of birth. See *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). The potential for statelessness arises when a child is born in a *jus sanguinis* country but is unable to obtain the nationality of either of his parents. In most of those countries (as in most *jus soli* countries), when a child was born to an unwed mother, the only parent legally recognized as the child's parent at the time of the birth usually was the mother. See Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258 & n.38 (1935) (cited in *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 431 (1945)). Although the child's father could subsequently obtain the status of a legal parent through legitimation (typically through marriage) or perhaps through other formal means, the establishment of such a relationship did not occur as a result of the birth alone. Thus, when a child was born out of wedlock, the only parent on whom a child's citizenship *at the time of birth* could be based in a *jus sanguinis* country was the mother. That state of affairs created a substantial risk that a child born to an unwed U.S.-citizen mother in a country employing *jus sanguinis* rules of citizenship would be stateless at birth unless the child could obtain the citizenship of the mother. The same risk was not present for the child of an unwed U.S.-citizen father in a *jus sanguinis* country that would allow the child to take the

citizenship of his mother, the only legally recognized parent at the time of the child's birth.

The differential treatment embodied in the physical-presence requirements, in addition to reflecting the difference in relative connections of the child to the United States through a legally recognized parent, thus also reflects the reality that, by operation of the law of many other countries, many children born abroad to an unwed U.S.-citizen mother could have had no nationality at birth. The statutory scheme does not "reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock," as the court of appeals concluded. App., *infra*, 30a-31a. It turned on legal rules establishing the legal status of parent and child, both abroad and in this country. Congress cannot be expected to ignore established foreign laws governing the legal status of a child's parents at birth. The Constitution's guarantee of equal protection does not require that Congress treat men and women the same in a particular context in which they are not similarly situated. See, *e.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). And this Court has already held, in particular, that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect, as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see also *Lehr* v. *Robertson*, 463 U.S. 248, 266-268 (1983); *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979) (opinion of Stewart, J.). The difference in each parent's situation under Section 1409(a) and (c) is attributable to what this Court in *Nguyen* described as the "significant difference between the[] respective relationships" of unwed mothers and unwed fathers

"to the potential citizen at the time of birth," 533 U.S. at 62, not to impermissible stereotypes.

Third, the court of appeals erred in concluding that the government's important interest in reducing statelessness was not sufficient to justify the scheme because, it reasoned, "effective gender-neutral alternatives" were available at the time of the statute's enactment. App., *infra*, 32a. The court based that assertion exclusively on a 1933 proposal by then-Secretary of State Cordell Hull that would have amended the nationality laws to provide:

> A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

*Id.* at 33a (quoting Letter from Cordell Hull, Secretary of State, to Samuel Dickstein, Chairman, Comm. on Immigration & Naturalization (Mar. 27, 1933), *reprinted in Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings Before the House Comm. On Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (1933 Hearing)). The court of appeals erred in relying on Secretary Hull's proposed amendment because the amendment, while gender-neutral on its face, would have applied in the same gender-specific manner that the challenged law does. As discussed, Congress was concerned that the only circumstance in which a child would be born abroad to an unwed U.S.-citizen parent

who was the *only* legal parent at the time of the child's birth was when the child's unwed *mother* was a U.S. citizen. That was clear to observers at the time. See 1933 Hearing 56 (noting that "[w]hile the State Department has made this to read as though [the Hull proposal] were equal as to men and women, I think they have an idea that it would just apply to women").

For purposes of assessing respondent's equal protection challenge, the salient fact is how the challenged law *operates*, not the words that it uses. As this Court explained in *Nguyen*:

> The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference [and in this case, a legal difference] between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.

533 U.S. at 64; see *ibid.* ("[T]o require Congress to speak without reference to the gender of the parent with regard to its objective of ensuring a blood tie between parent and child would be to insist on a hollow neutrality."). The court of appeals' reliance on Secretary Hull's proposed amendment was therefore error.

In any event, as explained above, the distinctions in and between Sections 1401(a)(7) and 1409 are independently supported by the substantial governmental interest in assuring a sufficient connection to the

United States of children who are not similarly situated.

### B. The Court Of Appeals Exceeded Its Constitutional And Statutory Authority By Extending U.S. Citizenship To Respondent

This Court's review is also warranted because the court of appeals exceeded its constitutional and statutory authority by declaring respondent to be a U.S. citizen.

This Court has noted that, when a court sustains an equal protection claim, it "faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Mathews*, 465 U.S. at 738 (citation omitted; brackets in original). This general rule rests on the premise that the appropriate solution to the abridgment of the Constitution's equal protection guarantee is to bring about equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* at 740; see *Miller*, 523 U.S. at 458 (Scalia, J., concurring in the judgment) ("The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision (here, supposedly, the provision governing citizenship of illegitimate children of citizen-mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen-fathers)."). The court of appeals chose to remedy the equal protection violation it perceived by "replacing the ten-year physical presence requirement in § 1401(a)(7) (and incor-

porated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c)." App., *infra*, 40a. In other words, the court extended what it viewed as the more favorable treatment (the one-year continuous-physical-presence requirement) to unmarried U.S.-citizen fathers (but not to married U.S.-citizen mothers or fathers).[11] The court of appeals erred in choosing that remedy because it flouts congressional intent and exceeds the court's authority with respect to naturalization.

1. The court of appeals' choice of remedy—imposed more than 60 years after Section 1409(c) was enacted, 50 years after respondent was born, and 40 years after his father legitimated him—would have the effect of granting U.S. citizenship (from birth) to an untold number of individuals who did not satisfy the statutory criteria set by Congress and who grew up with no expectation that they were citizens of the United States.[12] That result is inconsistent with this

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[11] The court of appeals thus purported to rewrite Section 1401(a)(7), as applied to unmarried parents through Section 1409(a), to provide that the following shall be nationals and citizens of the United States at birth:

> a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a *continuous period of one year*.

App., *infra*, 40a n.19.

[12] The court of appeals also failed to grasp that its approach to a remedy could make it *harder* for some unwed U.S.-citizen fathers to satisfy the conditions necessary to make their children (who are born abroad) U.S. citizens at birth under Section 1409. The court of appeals focused exclusively on the difference in *length* between

Court's cases holding that "the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers." *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."). Indeed, this Court acknowledged in *Nguyen* that "[t]here may well be potential problems with fashioning a remedy" if the Court were to find that the additional requirements applicable to unwed citizen fathers under Section 1409(a) violated equal protection. 533 U.S. at 72 (quoting *Miller*, 523 U.S. at 451 (O'Connor, J., concurring in the judgment)) (internal quotation marks omitted); accord *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) ("[T]he Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.").[13]

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the ten- and five-year physical-presence requirements in 8 U.S.C. 1409(a) and the one-year continuous-physical-presence requirement in Section 1409(c), without acknowledging that the relevant ten and five years need not be continuous. For example, some unwed citizen fathers who lived in border regions between the United States and Mexico or Canada and who traveled back and forth, might have been able to satisfy the ten- and five-year physical-presence requirements but not the one-year *continuous*-physical-presence requirement.

[13] The INA itself reflects courts' constrained authority to naturalize individuals who do not meet the statutory criteria established by Congress. In 8 U.S.C. 1421(d), Congress has specified

2. The court of appeals also erred insofar as it believed the remedy it imposed was consistent with congressional intent. The court noted that, before 1940, Congress had allowed the foreign-born children of U.S.-citizen fathers (and eventually mothers) to be U.S. citizens from birth if the parent had resided in the United States for any period of time prior to the birth. App., *infra*, 37a-38a. But the court of appeals took the wrong lesson from that "historical background against which Congress enacted the relevant provisions." *Id.* at 37a. The relevant question is what the intent of Congress in 1952 (or 1940, when Congress first expressly addressed the situation of children born out of wedlock) would have been if a court were to hold the provision unconstitutional. And the intent of that Congress was plainly to impose physical-presence requirements on all U.S.-citizen parents of children born abroad when the other parent is not a U.S. citizen—and indeed to impose a ten-year physical-presence requirement even when the parents were *married* at the time the child was born. It would be contrary to the statutory scheme for a court to impose only a one-year continuous-physical-presence requirement on all U.S.-citizen fathers when they were *not* married at the time of the child's birth and the father did not legitimate the child until years later, whether by later marriage to the child's alien mother (as occurred in respondent's case) or otherwise. The court of appeals erred in rejecting that clear manifestation of congressional intent merely because it could not "tell with confidence"

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that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the INA], and not otherwise."

whether that change "related to the emergence of the United States as a world power after World War II or an increasing number of children born of mixed-nationality parents, or some other set of factors." *Id.* at 38a. Whatever the explanation, it could not be more clear that Congress intended in 1940 and 1952 to impose substantial physical-presence requirements in order for the children born abroad of U.S.-citizen parents to acquire U.S. citizenship from birth.

Congress enacted a general rule of imposing the longer physical-presence requirement in the case of the great majority of foreign-born children who had a U.S.-citizen parent when the other parent was an alien—married mothers, married fathers, and unmarried fathers. The shorter period applied only in the case of the child of an unwed U.S.-citizen mother. If forced to choose between the two rules, there is no basis for assuming that Congress necessarily would have preferred to let the exception swallow the rule. Indeed, since 1940, when Congress first addressed the issue of when a foreign-born child with one U.S.-citizen parent and one alien parent may obtain U.S. citizenship at birth, it has always applied to unmarried U.S.-citizen fathers the longer physical-presence requirements applicable to married U.S.-citizen fathers (and mothers). The court of appeals' remedy "convert[s] what is congressional generosity into something unanticipated and obviously undesired by the Congress." *Bellei*, 401 U.S. at 835.

3. If the court of appeals had instead equalized the treatment of children of unwed U.S.-citizen mothers and all other U.S.-citizen parents by declaring invalid the exception in Section 1409(c) that creates the one-year continuous-physical-presence requirement for

unwed U.S.-citizen mothers, Congress could then address the situation after weighing the complex legal, policy, and foreign-relations considerations.

### C. The Second Circuit's Decision Directly Conflicts With A Decision Of The Ninth Circuit

1. The court of appeals' erroneous holding that an Act of Congress is unconstitutional is sufficient to warrant this Court's review. But review is particularly appropriate here because the court of appeals' decision has created a circuit conflict, as the Second Circuit acknowledged. App., *infra*, 22a, 34a n.17. In *United States* v. *Flores-Villar*, 536 F.3d 990 (2008), aff'd by an equally divided Court, 564 U.S. 210 (2011) (per curiam), the Ninth Circuit rejected precisely the same constitutional challenge to the same 1952 statutory scheme. See *id.* at 995-997.

2. The current state of affairs is contrary to the Constitution's call for "an uniform Rule of Naturalization" to apply "throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. The lack of uniformity created by the Second Circuit's decision, if allowed to stand, could greatly complicate the tasks of the Department of State, which issues passports in the United States and issues both passports and consular reports of birth abroad to U.S. citizens abroad, and of the Department of Homeland Security, which issues certificates of citizenship and is responsible for removing aliens from the United States.

This Court granted a petition for a writ of certiorari, even in the absence of a circuit conflict, in *Flores-Villar*, and affirmed the Ninth Circuit's decision by an equally divided Court. A fortiori, review by this Court of the Second Circuit's decision is warranted in this case, which has created a circuit conflict.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2016

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No: 11-1252

LUIS RAMON MORALES-SANTANA, AKA LUIS MORALES,
PETITIONER

*v.*

LORETTA E. LYNCH, UNITED STATES
ATTORNEY GENERAL, RESPONDENT

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Dec. 1, 2015

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**ORDER**

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Respondent Loretta E. Lynch filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ CATHERINE O'HAGAN WOLFE
CATHERINE O'HAGAN WOLFE,
Clerk

[SEAL OMITTED]

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No: 11-1252-ag

LUIS RAMON MORALES-SANTANA, AKA LUIS MORALES,
PETITIONER

*v.*

LORETTA E. LYNCH, UNITED STATES
ATTORNEY GENERAL, RESPONDENT

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Argued: Apr. 1, 2013
Decided: July 8, 2015
Amended: Oct. 30, 2015
Final Submission: Nov. 14, 2014

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Before: LOHIER, CARNEY, Circuit Judges, and RAKOFF, District Judge.**

LOHIER, Circuit Judge:

Luis Ramon Morales-Santana asks us to review a March 3, 2011 decision of the Board of Immigration

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** The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

Appeals ("BIA") denying his motion to reopen his removal proceedings relating to his claim of derivative citizenship. Under the statute in effect when Morales-Santana was born—the Immigration and Nationality Act of 1952 (the "1952 Act")—a child born abroad to an unwed citizen mother and non-citizen father has citizenship at birth so long as the mother was present in the United States or one of its outlying possessions for a continuous period of at least one year at some point prior to the child's birth. *See* 1952 Act, § 309(c), 66 Stat. 163, 238-39 (codified at 8 U.S.C. § 1409(c) (1952)).[1] By contrast, a child born abroad to an unwed citizen father and non-citizen mother has citizenship at birth only if the father was present in the United States or one of its outlying possessions prior to the child's birth for a period or periods totaling at least ten years, with at least five of those years occurring after the age of fourteen. *See id.* § 309(a) (codified at 8 U.S.C. § 1409(a) (1952)); *see also id.* § 301(a)(7) (codified at 8 U.S.C. § 1401(a)(7) (1952)).[2] Morales-Santana's

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[1] Unless otherwise noted, references to §§ 1401 and 1409 are to those sections as they appear in the 1952 Act, and references to other statutory provisions are to those sections as they appear in the current codification.

[2] Section 1401(a)(7) provided:

> The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical

father satisfied the requirements for transmitting citizenship applicable to unwed mothers but not the more stringent requirements applicable to unwed fathers. On appeal, Morales-Santana argues principally that this gender-based difference violates the Fifth Amendment's guarantee of equal protection and that the proper remedy is to extend to unwed fathers the benefits unwed mothers receive under § 1409(c). We agree and hold that Morales-Santana derived citi-

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limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years . . . .

Section 1409(a) provided that § 1401(a)(7) "shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act," provided that paternity is established "by legitimation" before the child turns 21. Section 1409(c) provided:

> Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

zenship at birth through his father. We accordingly REVERSE the BIA's decision and REMAND for further proceedings consistent with this opinion.

## BACKGROUND

### I. *Facts*

The following undisputed facts are drawn from the record on appeal. Morales-Santana's father, Jose Dolores Morales, was born in Puerto Rico on March 19, 1900 and acquired United States citizenship in 1917 pursuant to the Jones Act. *See* Jones Act of Puerto Rico, ch. 145, 39 Stat. 951 (codified at 8 U.S.C. § 1402 (1917)). He was physically present in Puerto Rico until February 27, 1919, 20 days before his nineteenth birthday, when he left Puerto Rico to work in the Dominican Republic for the South Porto Rico Sugar Company.

In 1962 Morales-Santana was born in the Dominican Republic to his father and his Dominican mother. Morales-Santana was what is statutorily described as "legitimat[ed]" by his father upon his parents' marriage in 1970 and admitted to the United States as a lawful permanent resident in 1975. 8 U.S.C. § 1409(a). Morales-Santana's father died in 1976.

## II. *Statutory Framework*

Unlike citizenship by naturalization, derivative citizenship exists as of a child's birth or not at all. *See* 8 U.S.C. § 1409(a), (c); *cf. id.* § 1101(a)(23). The law in effect at the time of birth governs whether a child obtained derivative citizenship as of his or her birth. *See Ashton v. Gonzales*, 431 F.3d 95, 97 (2d Cir. 2005). Accordingly, the 1952 Act provides the statutory framework applicable to Morales-Santana's nationality claim.

As noted, the 1952 Act limits the ability of an unwed citizen father to confer citizenship on his child born abroad —where the child's mother is not a citizen at the time of the child's birth—more stringently than it limits the ability of a similarly situated unwed citizen mother to do the same. *Compare* 8 U.S.C. § 1401(a)(7), *with id.* § 1409(c).[3] We note that this difference in treatment of unwed citizen fathers and unwed citizen mothers, though

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[3] In addition to satisfying the requirements of § 1401(a)(7), the father must establish his paternity through legitimation of the child before the child turns 21. See 8 U.S.C. § 1409(a). As both parties agree, Morales-Santana's father legitimated his son in 1970. Morales-Santana does not contest the statute's legitimation requirement, and that requirement is not at issue on appeal. *See Nguyen v. INS*, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001) (upholding as constitutional the similar legitimation requirement found in the current version of the statute, 8 U.S.C. § 1409(a)(4) (2000)).

diminished, persists in the current statute. *Compare* 8 U.S.C. § 1409(a) (2012) (applying to unwed citizen fathers § 1401(g), which requires five years of physical presence, two of which must be after age fourteen), *with id.* § 1409(c) (maintaining the 1952 Act's conferral of derivative citizenship based on an unwed mother's continuous physical presence for one year at any time prior to the child's birth).

III. *Procedural History*

In 2000 Morales-Santana was placed in removal proceedings after having been convicted of various felonies. He applied for withholding of removal on the basis of derivative citizenship obtained through his father. An immigration judge denied the application. In 2010 Morales-Santana filed a motion to reopen based on a violation of equal protection and newly obtained evidence relating to his father. The BIA rejected Morales-Santana's arguments for derivative citizenship and denied his motion to reopen.

## DISCUSSION

Morales-Santana makes four arguments for derivative citizenship: (1) that his father's physical absence from the United States during the 20 days directly prior to his father's nineteenth birthday constituted a *de minimis* "gap" in physical presence, and that such gaps should not count against a finding of physical

presence for purposes of § 1401(a)(7); (2) that the South Porto Rico Sugar Company, which employed his father after his father moved to the Dominican Republic, was a multi-national United States-owned company and therefore effectively part of the United States government or an international organization as defined in 22 U.S.C. § 288, *see* 1966 Act to Amend the Immigration and Nationality Act (the "1966 Act"), 80 Stat. 1322 (codified at 8 U.S.C. § 1401(a)(7) (1966)) (counting periods of employment for certain organizations toward the statute's physical presence requirements); (3) that at the time his father moved to the Dominican Republic it was an "outlying possession" of the United States; and (4) as noted, that the different physical presence requirements applicable to unwed fathers and unwed mothers under the 1952 Act violate equal protection.

Consistent with our obligation to avoid constitutional questions if possible, we first address Morales-Santana's three statutory arguments for derivative citizenship. *See Escambia Cnty., Fla. v. McMillan*, 466 U.S. 48, 51, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984) (per curiam).

As to both his statutory and constitutional arguments, we review *de novo* the question of Morales-Santana's derivative citizenship. *See Phong Thanh Nguyen v. Chertoff*, 501 F.3d 107, 111 (2d Cir. 2007). "If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits

that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim." 8 U.S.C. § 1252(b)(5)(A). No material facts are disputed.

I. *Statutory Arguments*

Morales-Santana contends that his father's absence from the United States during the 20 days prior to his father's nineteenth birthday constitutes a *de minimis* "gap" in his father's physical presence and that such gaps should not be held against someone who claims to have satisfied the 1952 Act's physical presence requirement. In support, Morales-Santana points to continuous physical presence requirements under the immigration laws that explicitly excuse *de minimis* absences. *See, e.g.*, *id.* § 1229b(b)(1)(A), (d)(2) (2012) (absences of 90 continuous days or fewer do not break "continuity" of physical presence for purposes of cancellation of removal for a lawful permanent resident.); *id.* §§ 1255(*l*)(3), 1255a(a)(3)(B). By its plain terms, § 1401(a)(7) had no similar exception. In any event, because Morales-Santana's father left the United States and its outlying possessions 20 days prior to his nineteenth birthday and never returned, there was no "gap" in his father's physical presence that bridged two periods of physical presence. So even if we recognized an exception to the physical presence requirement in § 1401 for *de minimis* "gaps," we would reject Morales-Santana's claim on this basis.

Relying on the 1966 Act, Morales-Santana next argues that his father's employment with the South Porto Rico Sugar Company in the Dominican Republic immediately after leaving Puerto Rico satisfied the statute's physical presence requirement by effectively continuing his physical presence through the requisite period. It is true that the 1966 Act provided that employment with the United States Government or with an international organization, as defined in 22 U.S.C. § 288, satisfied the physical presence requirement. *See* 8 U.S.C. § 1401(a)(7) (1966). But Morales-Santana's argument lacks merit because his father's employment with the South Porto Rico Sugar Company, a multinational company, did not constitute employment with the United States Government. *See Drozd v. INS*, 155 F.3d 81, 86 (2d Cir. 1998). Nor did it constitute employment with an international organization as defined in 22 U.S.C. § 288, since the South Porto Rico Sugar Company was neither "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation," nor "designated by the President" as such. 22 U.S.C. § 288.

As his final statutory argument, Morales-Santana contends that the Dominican Republic was an "outlying possession" of the United States for purposes of the 1952 Act when Morales-Santana's father was there in 1919. Two factors convince us that Congress did not intend to

include the Dominican Republic within the scope of the term "outlying possession" in 8 U.S.C. § 1401.[4]

First, there is no treaty or lease pursuant to which the Dominican Republic was acquired. This stands in contrast to the Philippines, Guam, Puerto Rico, and the U.S. Virgin Islands, all of which were acquired by the United States by treaty, *see* Treaty of Peace between the United States and the Kingdom of Spain, 30 Stat. 1754 (1899); Convention between the United States and Denmark, 39 Stat. 1706 (1917), and all of which were outlying possessions when the United States exercised sovereignty over them, *see Matter of V-*, 9 I. & N. Dec. 558, 561 (1962); *Matter of Y—*, 7 I. & N. Dec. 667, 668 (1958). The case of Guantanamo Bay, Cuba is a little different in that it involves both a lease and a treaty, but it yields the same result vis-à-vis the Dominican Republic. In *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008), the Supreme Court determined that the "complete jurisdiction and control" by the United States over Guantanamo Bay constituted "*de facto*" sovereignty over it.

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[4] Congress did not define "outlying possessions" until the Nationality Act of 1940, which defined "outlying possessions" as "all territory . . . over which the United States exercises rights of sovereignty, except the Canal Zone." *See* § 101(e), 54 Stat. 1137 (codified at 8 U.S.C. § 501(e) (1940)). The 1952 Act defined the term to include only "American Samoa and Swains Island." 101(a)(29), 66 Stat. 170 (codified at 8 U.S.C. § 1101(a)(29) (1952)).

*Id.* at 753-55, 128 S. Ct. 2229 (quotation marks omitted). The Court added, though, that in a 1903 Lease Agreement between Cuba and the United States, the former granted the latter "complete jurisdiction and control" over Guantanamo Bay and that "[u]nder the terms of [a] 1934 [t]reaty, . . . Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons" Guantanamo Bay. *Id.* at 753, 128 S. Ct. 2229. By contrast, there is no lease or treaty that conferred to the United States *de facto* or *de jure* sovereignty over the Dominican Republic.

Second, we acknowledge the historical fact that the United States exercised significant control during its military occupation of the Dominican Republic from 1916 to 1924. *See Ingenio Porvenir C. Por A. v. United States*, 70 Ct. Cl. 735, 738 (1930). But that control did not extinguish the sovereignty of the Dominican Republic. Indeed, the Proclamation of the Military Occupation of Santo Domingo by the United States specifically declared that the purpose of the temporary military occupation was "to give aid to [the Dominican Republic] in returning to a condition of internal order" without "destroying the sovereignty of" the Dominican Republic. 11 Supp. Am. J. Int'l L. 94, 94-96 (1917) (Nov. 29, 1916 Proclamation); *see also* Bruce J. Calder, *The Impact of Intervention: The Dominican Republic During the U.S. Occupation of 1916-1924*, xxvii, 17, 205 (2d ed. 2006).

Having rejected Morales-Santana's statutory arguments for derivative citizenship, we now consider his constitutional equal protection argument.

II. *Equal Protection*

Morales-Santana argues principally that the 1952 Act's treatment of derivative citizenship conferral rights violates the Fifth Amendment's guarantee of equal protection.[5] As we have explained, under the 1952 Act, an unwed citizen mother confers her citizenship on her child (born abroad to a non-citizen biological father) so long as she has satisfied the one-year continuous presence requirement prior to the child's birth. The single year of presence by the mother can occur at any time prior to the child's birth—including, for example, from the mother's first birthday until her second birthday. An unwed citizen father, by contrast, faces much more stringent re-

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[5] Morales-Santana has standing to assert this equal protection claim on behalf of his father since Morales-Santana alleges that his father suffered an injury in fact, that his father bears a close relation to him, and that his father's ability to assert his own interests is hindered because his father is deceased. *See Campbell v. Louisiana*, 523 U.S. 392, 397, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998) (citing *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)); *see also Miller v. Albright*, 523 U.S. 420, 433, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (opinion of Stevens, J.); *id.* at 449-50, 118 S. Ct. 1428 (O'Connor, J., concurring); *id.* at 454 n.1, 118 S. Ct. 1428 (Scalia, J., concurring); *id.* at 473 (Breyer, J., dissenting).

quirements under 8 U.S.C. § 1409(a), which incorporates § 1401(a)(7). He is prevented from transmitting his citizenship (to his child born abroad to a non-citizen mother) unless he was physically present in the United States or an outlying possession prior to the child's birth for a total of at least ten years.[6] Because five of those years must follow the father's fourteenth birthday, an unwed citizen father cannot transmit his citizenship to his child born abroad to a non-citizen mother before the father's nineteenth birthday. Eighteen-year-old citizen fathers and their children are out of luck.

As both parties agree, had Morales-Santana's mother, rather than his father, been a citizen continuously present in Puerto Rico until 20 days prior to her nineteenth birthday, she would have satisfied the requirements to confer derivative citizenship on her child. It is this gender-based difference in treatment that Morales-Santana claims violated his father's right to equal protection.

The Government asserts that the difference is justified by two interests: (1) ensuring a sufficient connection between citizen children and the United States, and (2) avoiding statelessness. In what follows, we apply intermediate scrutiny to assess these asserted interests, and we conclude that neither interest is advanced by the

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[6] As noted, the father must also satisfy a legitimation requirement. *See* 8 U.S.C. § 1409(a).

statute's gender-based physical presence requirements. After determining that these physical presence requirements violate equal protection, we apply the statute's severance clause and determine that Morales-Santana, under the statute stripped of its constitutional defect, has citizenship as of his birth.

A. *Level of Scrutiny*

We apply intermediate, "heightened" scrutiny to laws that discriminate on the basis of gender. *United States v. Virginia*, 518 U.S. 515, 531-33, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Under intermediate scrutiny, the government classification must serve actual and important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives. *Nguyen v. INS*, 533 U.S. 53, 68, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001); *Virginia*, 518 U.S. at 533, 116 S. Ct. 2264. Furthermore, the justification for the challenged classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533, 116 S. Ct. 2264.

In urging us to apply rational basis scrutiny instead, the Government relies on *Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977). In *Fiallo*, the Su-

preme Court applied rational basis scrutiny to a section of the 1952 Act that gave special preference for admission into the United States to non-citizens born out of wedlock seeking entry by virtue of a relationship with their citizen mothers, but not to similarly situated non-citizens seeking entry by virtue of a relationship with their citizen fathers. *See id.* at 798, 97 S. Ct. 1473. The Court reasoned that rational basis scrutiny was warranted because "over no conceivable subject is the legislative power of Congress more complete than it is over *the admission of aliens*," and "[o]ur cases have long recognized the power *to expel or exclude aliens* as a fundamental sovereign attribute exercised by the Government's political departments." *Id.* at 792, 97 S. Ct. 1473 (emphases added) (quotation marks omitted); *see also Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972) (Congress has "plenary power" to make rules for the admission and exclusion of non-citizens. (quotation marks omitted)).

But *Fiallo* is distinguishable. In *Fiallo*, the children's alienage implicated Congress's "exceptionally broad power" to admit or remove non-citizens. *Fiallo*, 430 U.S. at 794, 97 S. Ct. 1473. Here, by contrast, there is no similar issue of alienage that would trigger special deference. Because Morales-Santana instead claims pre-existing citizenship at birth, his challenge does not implicate Congress's "power to admit or exclude foreigners," *id.* at 795 n.6, 97 S. Ct. 1473 and therefore is not governed by *Fiallo*.

Our view of *Fiallo*'s limited scope is grounded in Supreme Court and circuit caselaw. As an initial matter, we note that the Supreme Court has never applied the deferential *Fiallo* standard to issues of gender discrimination under § 1409, despite being asked to do so on at least three occasions. *See Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (declining to apply *Fiallo*); *Nguyen v. INS*, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001) (applying heightened scrutiny); *Flores-Villar* v. *United States*, — U.S. —, 131 S. Ct. 2312, 180 L. Ed. 2d 222 (2011) (per curiam) (affirming without opinion by divided 4-4 vote). Justice Stevens' opinion in *Miller* succinctly described *Fiallo*'s limitation: "It is of significance that the petitioner in this case, unlike the petitioners in *Fiallo*, . . . is not challenging the denial of an application for special [immigration] status. She is contesting the Government's refusal to . . . treat her as a citizen. If she were to prevail, the judgment . . . would confirm her pre-existing citizenship." *Miller*, 523 U.S. at 432, 118 S. Ct. 1428 (opinion of Stevens, J.); *see also id.* at 429, 118 S. Ct. 1428 ("*Fiallo* . . . involved the claims of . . . aliens to a special immigration preference, whereas here petitioner claims that she is, and for years has been, an American citizen.").

Although no opinion in *Miller* received a majority of votes, we observed in *Lake v. Reno* that "seven justices in *Miller* would have applied heightened scrutiny . . . [to INA] section 309(a)." 226 F.3d 141, 148 (2d Cir. 2000),

*vacated sub nom. Ashcroft v. Lake*, 533 U.S. 913, 121 S. Ct. 2518, 150 L. Ed. 2d 691 (2001) (citing *Nguyen*), *abrogated on other grounds by Lake v. Ashcroft*, 43 Fed. Appx. 417, 418 (2d Cir. 2002). Later, in *Lewis v. Thompson*, we explained *Lake*'s holding in a way that makes it clear that heightened scrutiny, rather than *Fiallo*'s more deferential standard of review, should apply to Morales-Santana's claim: "[W]e have already held in *Lake*, drawing an inference from the various opinions of the Justices in *Miller*, that citizen claimants with an equal protection claim deserving of heightened scrutiny do not lose that favorable form of review simply because the case arises in the context of immigration." 252 F.3d 567, 591 (2d Cir. 2001); *see also id.* at 590 ("As we recognized in *Lake*, *Fiallo* itself made clear that the reduced threshold of justification for governmental action *that applied to immigrants* did not apply to citizens." (emphasis added) (quotation marks omitted)). Our sister circuits that have considered *Fiallo*'s application to claims similar to Morales-Santana's are in accord. *See Nguyen v. INS*, 208 F.3d 528, 535 (5th Cir. 2000) (noting that "the statute in *Fiallo* dealt with the claims of aliens for special immigration preferences for aliens, whereas the petitioner's claim in this case is that he is a citizen"), *aff'd*, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001); *Breyer v. Meissner*, 214 F.3d 416, 425 (3d Cir. 2000) (applying heightened scrutiny to § 1993 of the Revised Statutes of 1874, a predecessor to § 1409, because it "created a gender

classification with respect to [petitioner's] mother's ability to pass her citizenship to her foreign-born child at his birth"); *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1126 (9th Cir. 1999) (applying *Miller* to "f[i]nd § 1409(a)(4) unconstitutional by applying heightened scrutiny"), *vacated*, 533 U.S. 913, 121 S. Ct. 2518, 150 L. Ed. 2d 691 (2001) (citing *Nguyen*), *abrogated on other grounds by* 295 F.3d 943 (9th Cir. 2002); *cf. United States v. Flores-Villar*, 536 F.3d 990, 996 n.2 (9th Cir. 2008) ("Like the Supreme Court in *Nguyen*, we will assume that intermediate scrutiny applies."), *aff'd by an equally divided Court*, — U.S. —, 131 S. Ct. 2312, 180 L. Ed. 2d 222.

For these reasons, we conclude that the gender-based scheme in §§ 1401 and 1409 can be upheld only if the Government shows that it is substantially related to an actual and important governmental objective. *See Virginia*, 518 U.S. at 531, 533, 535-36, 116 S. Ct. 2264; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982). In assessing the validity of the gender-based classification, moreover, classification. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151, 100 S. Ct. 1540, 64 L. Ed. 2d 107 (1980); *Orr v. Orr*, 440 U.S. 268, 281, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975).

### B. *Governmental Interests and Tailoring*

Having determined that intermediate scrutiny applies, we examine the two interests that the Government claims support the statute's gender-based distinction.

#### 1. *Ensuring a Sufficient Connection Between the Child and the United States*

The Government asserts that Congress passed the 1952 Act's physical presence requirements in order to "ensur[e] that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship." Respondent's Br. 38-39. As both parties agree, this interest is important, and Congress actually had it in mind when requiring some period of physical presence before a citizen parent could confer citizenship on his or her child born abroad. *See* Petitioner's Br. 35 n.17 (citing *Weedin v. Chin Bow*, 274 U.S. 657, 666-67, 47 S. Ct. 772, 71 L. Ed. 1284 (1927)).

The Government invokes this important interest but fails to justify the 1952 Act's different treatment of mothers and fathers by reference to it. It offers no reason, and we see no reason, that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the

statute seeks to ensure are passed on to citizen children born abroad.

We recognize that our determination conflicts with the decision of the Ninth Circuit in *Flores-Villar*, 536 F.3d 990, which addressed the same statutory provisions and discussed the same governmental interest in ensuring a connection between child and country. The Ninth Circuit concluded that in addition to preventing or reducing statelessness—an objective we address below—"[t]he residence differential . . . furthers the objective of developing a tie between the child, his or her father, and this country." *Flores-Villar*, 536 F.3d at 997. The Ninth Circuit provided no explanation for its conclusion, and the Government provides none here.

Instead, the Government relies on *Nguyen* to explain why the different physical presence requirements for unwed men and women reflect a concern with ensuring an adequate connection between the child and the United States. We are not persuaded. In *Nguyen*, the Court upheld the Immigration and Nationality Act's requirement that a citizen father seeking to confer derivative citizenship on his foreign-born child take the affirmative step of either legitimating the child, declaring paternity

under oath, or obtaining a court order of paternity.[7] *See Nguyen*, 533 U.S. at 62, 121 S. Ct. 2053; 8 U.S.C. § 1409(a)(4) (2000). The *Nguyen* Court determined that two interests supported the legitimation requirement for citizen fathers of children born abroad.

The first interest, "assuring that a biological parent-child relationship exists," *Nguyen*, 533 U.S. at 62, 121 S. Ct. 2053; *see Miller*, 523 U.S. at 435-36, 118 S. Ct. 1428 is irrelevant to the 1952 Act's physical presence requirements because derivative citizenship separately requires unwed citizen fathers to have legitimated their foreign-born children. Here, Morales-Santana's father established his biological tie to Morales-Santana by legitimating him. His physical presence in Puerto Rico for ten years as opposed to one year prior to Morales-Santana's birth would have provided no additional assurance that a biological tie existed.

The *Nguyen* Court identified a second interest in ensuring "that the child and the citizen parent have some demonstrated opportunity or potential to develop" a "real, meaningful relationship." *Nguyen*, 533 U.S. at 64-65, 121 S. Ct. 2053. The Court explained that a biological mother, by virtue of giving birth to the child, "knows that the

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[7] For brevity, we refer to these as constituting a "legitimation requirement," though legitimation is just one of three ways of satisfying the statutory provision.

child is in being and is hers," but that an unwed biological father might in some cases not even "know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity." *Id.* at 65, 121 S. Ct. 2053. Rather than requiring a case-by-case analysis of whether a father or a mother has a "real, meaningful relationship" with a child born abroad, "Congress enacted an easily administered scheme to promote the different but still substantial interest of ensuring at least an opportunity for a parent-child relationship to develop." *Id.* at 69, 121 S. Ct. 2053. This interest in ensuring the "opportunity for a real, meaningful relationship" between parent and child is likewise not relevant to the 1952 Act's physical presence requirements. By legitimating his son, Morales-Santana's father took the affirmative step of demonstrating that an opportunity for a meaningful relationship existed. And again, requiring that Morales-Santana's father be physically present in Puerto Rico prior to Morales-Santana's birth for ten years instead of one year would have done nothing to further ensure that an opportunity for such a relationship existed.

So we agree that unwed mothers and fathers are *not* similarly situated with respect to the two types of parent-to-child "ties" justifying the legitimation requirement at issue in *Nguyen*. But unwed mothers and fathers *are* similarly situated with respect to *how long* they should be present in the United States or an outlying possession prior to the child's birth in order to have assimilated

citizenship-related values to transmit to the child. Therefore, the statute's gender-based distinction is not substantially related to the goal of ensuring a sufficient connection between citizen children and the United States.

2. *Preventing Statelessness*

Having concluded that the Government's interest in establishing a connection between the foreign-born child and the United States does not explain or justify the gender-based distinction in the 1952 Act's physical presence requirements, we now turn to the Government's other asserted interest. The Government argues that Congress enacted different physical presence requirements in § 1409(a) (incorporating § 1401(a)(7)) and § 1409(c) to reduce the level of statelessness among newborns. For example, a child born out of wedlock abroad may be stateless if he is born inside a country that does not confer citizenship based on place of birth and neither of the child's parents conferred derivative citizenship on him.

The avoidance of statelessness is clearly an important governmental interest. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160-61, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963); *Trop v. Dulles*, 356 U.S. 86, 102, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion). Contrary to the Government's claim, though, avoidance of statelessness does not appear to have been Congress's actual purpose in

establishing the physical presence requirements in the 1952 Act, *see Virginia*, 518 U.S. at 533, 116 S. Ct. 2264 and in any event the gender-based distinctions in the 1952 Act's physical presence requirements are not substantially related to that objective.

a. *Actual Purpose*

Some historical background is useful to understand Congress's purpose in establishing the 1952 Act's gender-based physical presence requirements. Until 1940, a citizen father whose child was born abroad transmitted his citizenship to that child if the father had resided in the United States for *any period* of time prior to the child's birth. *See Rogers v. Bellei*, 401 U.S. 815, 823-25, 91 S. Ct. 1060, 28 L. Ed. 2d 499 (1971) (discussing the Act of March 26, 1790, 1 Stat. 103, and successive statutes); Act of May 24, 1934, ch. 344, 48 Stat. 797; Nationality Act of 1940 (the "1940 Act"), ch. 876, § 201(g), 54 Stat. 1137, 1139. Consistent with common law notions of coverture, and with the notion that the husband determined the political and cultural character of his dependents (wife and children included), prior to 1934 married women had no statutory right to confer their own citizenship.[8] *See Brief [of] Amici*

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[8] In 1934 Congress granted citizen mothers, whether married or unmarried, the right to confer citizenship on their children born abroad if the mother satisfied the same minimal residency require-

*Curiae of Professors of History, Political Science, and Law in Support of Petitioner* at 9, *Flores-Villar v. United States*, — U.S. —131 S. Ct. 2312, 180 L. Ed. 2d 222, (2010), 2010 WL 2602009; Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 84 (1998). But for *unmarried* citizen mothers, the State Department's practice since at least 1912 was to grant citizenship to their foreign-born children on the theory that an unmarried mother "stands in the place of the father" and is in any event "bound to maintain [the child] as its natural guardian." *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 431 (1945) (quotation marks omitted).

In 1940 Congress for the first time explicitly addressed the situation of children born out of wedlock. It enacted Section 205 of the 1940 Act, 54 Stat. at 1139-40, which provided that citizen fathers and married citizen mothers could transmit citizenship to their child born abroad only after satisfying an age-calibrated ten-year physical presence requirement, but that *unmarried* citizen mothers could confer citizenship if they had resided in the United States at any point prior to the child's birth. The 1952

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ment applicable to citizen fathers. *See* Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797.

Act retained this basic statutory structure, though it imposed a somewhat more stringent requirement that unmarried mothers have been physically present in the United States for a continuous period of one year in order to confer citizenship. 8 U.S.C. § 1409(c).

Neither the congressional hearings nor the relevant congressional reports concerning the 1940 Act contain any reference to the problem of statelessness for children born abroad.[9] The congressional hearings concerning the 1952 Act are similarly silent about statelessness as a driving concern.[10] Notwithstanding the absence of relevant dis-

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[9] *Cf.* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2205 n.283 (2014) ("[I]n the many hundreds of pre-1940 administrative memos I have read that defend or explain recognition of the nonmarital foreign-born children of American mothers as citizens, I have identified exactly one memo by a U.S. official that mentions the risk of statelessness for the foreign-born nonmarital children of American mothers as a concern." (citing Memorandum from Green Hackworth, Office of the Solicitor, U.S. Dep't of State, to Richard Flournoy, Office of the Solicitor, U.S. Dep't of State (Aug. 14, 1928) (on file with National Archives and Records Administration, Relevant Group 59, Central Decimal File 131))).

[10] The Government does cite one congressional report in which statelessness was mentioned in conjunction with the 1952 Act. A Senate Report dated January 29, 1952 mentions the problem of statelessness in explaining why the 1952 Act eliminated a provision in the 1940 Act that had conditioned a citizen mother's ability to

cussion concerning the problem of statelessness for children born abroad in the legislative history, the Government points to the Executive Branch's explanatory comments to Section 204 of the proposed nationality code that Congress would ultimately enact as the 1940 Act. *See* 76th Cong. 431. These comments refer to a 1935 law review article entitled *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935), by Durward V. Sandifer.[11] According to the article, in 1935 approximately

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transmit nationality to her child on the father's failure to legitimate the child prior to the child's eighteenth birthday. *See* 1940 Act, § 205, 54 Stat. at 1140 ("*In the absence of . . . legitimation or adjudication* [during the child's minority], . . . the child" born abroad to an unmarried citizen mother "shall be held to have acquired at birth [the mother's] nationality status." (emphases added)). The 1952 Act eliminated this provision, allowing the mother to transmit citizenship independent of the father's actions. S. Rep. No. 1137, at 39 (1952) ("This provision establishing the child's nationality as that of the [citizen] mother *regardless of legitimation or establishment of paternity* is new. It insures that the child shall have a nationality at birth." (emphasis added)).

Although the Report reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue in this appeal.

[11] Contrary to the Government's assertion, the Sandifer article does not indicate that it was "conducted by the State Department." Rather, Sandifer, who worked at the State Department at the time he wrote the article, explains at the outset that he decided to write

thirty countries had statutes assigning children born out of wedlock the citizenship of their mother. *Id.* at 258. From the comments and the article, the Government urges us to infer that "Congress was aware" there existed "a substantial risk that a child born to an unwed U.S. citizen mother in a country employing [laws determining citizenship based on lineage, rather than place of birth] would be stateless at birth unless the mother could pass her citizenship to her child," and that this risk was "unique" to the children of unwed citizen mothers. Respondent's May 8, 2013 Supp. Br. 2, 6-7.[12]

Based on our review of the Executive Branch's explanatory comments and the Sandifer article, we decline the Government's invitation. The explanatory comments do not mention statelessness and do not refer to the Sandifer article's discussion of statelessness. In any event, the Sandifer article itself does not support the Government's argument that the children of unwed citizen mothers faced a greater risk of statelessness than the children of unwed citizen fathers.

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it at the suggestion of a colleague, not pursuant to an official directive. *See* Sandifer, *Comparative Study*, 29 Am. J. Int'l L. at 248.

[12] In response to our order requesting supplemental briefing on the issue, the Government was unable to furnish any other evidence that Congress enacted or the Executive encouraged the 1940 Act's or the 1952 Act's gender-based physical presence requirements due to concerns about statelessness.

While the Executive Branch's comments ignore the problem of statelessness, they arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock.[13] Other contemporary administrative memoranda similarly ignore the risk of statelessness for children born out of wedlock abroad to citizen mothers.[14]

In sum, we discern no evidence (1) that Congress enacted the 1952 Act's gender-based physical presence requirements out of a concern for statelessness, (2) that the problem of statelessness was in fact greater for children of unwed citizen mothers than for children of unwed citizen fathers, or (3) that Congress believed that the problem of

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[13] The comments reflect the view that the mother "is bound to maintain" "custody and control of . . . a child [born out of wedlock] as against the putative father" as its "natural guardian" and that "[t]he mother, as guardian by nurture, has the right to the custody and control of her bastard child." 76th Cong. 431 (quotation marks omitted); *see also* Collins, 123 Yale L.J. at 2205 ("[T]he historical record reveals that the pronounced gender asymmetry of the [1940] Nationality Act's treatment of nonmarital foreign-born children of American mothers and fathers was shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child—and the father's lack of such a relationship."); *id.* at 2203 (quoting as representative of contemporary views an internal letter to a State Department official stating that "as a practical matter, it is well known that almost invariably it is the mother who concerns herself with [the nonmarital] child").

[14] *See* Collins, 123 Yale L.J. at 2205 n.283.

statelessness was greater for children of unwed citizen mothers than for children of unwed citizen fathers. We conclude that neither reason nor history supports the Government's contention that the 1952 Act's gender-based physical presence requirements were motivated by a concern for statelessness, as opposed to impermissible stereotyping.

b. *Substantial Relationship Between Ends and Means*

Even assuming for the sake of argument that preventing statelessness was Congress's actual motivating concern when it enacted the physical presence requirements, we are persuaded by the availability of effective gender-neutral alternatives that the gender-based distinction between § 1409(a) (incorporating § 1401(a)(7)) and § 1409(c) cannot survive intermediate scrutiny. *See Wengler*, 446 U.S. at 151 (invalidating a gender-based classification where a gender-neutral approach would serve the needs of both classes); *Orr*, 440 U.S. at 282-83, 99 S. Ct. 1102 ("A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny."). As far back as 1933, Secretary of State Cordell Hull proposed just such a gender-neutral alternative in a letter to the Chairman of the House Committee on Immigration and Naturalization. Secretary Hull suggested that the immigration laws be revised

"to obtain the objective of parity between the sexes in nationality matters" by "remov[ing] . . . discrimination between" mothers and fathers "with regard to the transmission of citizenship to children born abroad." Hull proposed the following language:

> PROPOSED AMENDMENT . . .
>
> (d) A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

Letter from Sec'y Hull to Chairman Dickstein (Mar. 27, 1933) (Respondent's May 8, 2013 Supp. Br. Ex. B).[15]

And unlike the legitimation requirement at issue in *Nguyen*, which could be satisfied by, for example, "a written acknowledgment of paternity under oath," the physical presence requirement that Morales-Santana challenges imposes more than a "minimal" burden on

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[15] In 1936, an Executive Branch official who participated in drafting the 1940 Act recognized that "Section 204 [of the 1940 Act] as drawn up by the Committee slightly discriminates in favor of women." Letter from John J. Scanlon to Ruth B. Shipley, U.S. Dep't of State (Mar. 7, 1936) (Petitioner's Nov. 14, 2014 Supp. Br. Ex. 4); *see also* Collins, 123 Yale L.J. at 2235.

unwed citizen fathers. *See Nguyen*, 533 U.S. at 70-71, 121 S. Ct. 2053. It adds to the legitimation requirement ten years of physical presence in the United States, five of which must be after the age of fourteen. In our view, this burden on a citizen father's right to confer citizenship on his foreign-born child is substantial.[16]

For these reasons, the gender-based distinction at the heart of the 1952 Act's physical presence requirements is not substantially related to the achievement of a permissible, non-stereotype-based objective.[17]

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[16] As we have already noted, the burden is actually *impossible* for eighteen-year-old unwed citizen fathers to satisfy.

[17] We note once more that our conclusion differs from that of the Ninth Circuit in *Flores-Villar*. There the Ninth Circuit assumed, *sub silentio*, that Congress's enactment of the physical presence requirements was actually motivated by concern for reduction in the risk of statelessness. It also nominally assumed, without deciding, that intermediate scrutiny applied. *See* 536 F.3d at 996 & n.2. We disagree with the Ninth Circuit that the Government has carried its burden of showing an "exceedingly persuasive justification" for the statute's gender-based classification as a means of addressing the problem of statelessness. *See Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981). The Government has not shown that the problem arose—or was perceived to arise—more often with citizen mothers than with citizen fathers of children born out of wedlock abroad. *See, e.g.*, Sandifer, *Comparative Study*, 29 Am. J. Int'l L. at 254; *Brief of*

### 3. *Remedy*

We now turn to the most vexing problem in this case. Here, two statutory provisions—§ 1409(c) and (a)[18]—combine to violate equal protection. What is the remedy for this violation of equal protection, where citizenship is at stake? Ordinarily, "when the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984) (emphasis omitted) (quoting *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247, 52 S. Ct. 133, 76 L. Ed. 265 (1931)); *accord Califano v. Westcott*, 443 U.S. 76, 89, 99 S. Ct. 2655, 61 L. Ed. 2d (1979).

As we see it, "equal treatment" might be achieved in any one of three ways: (1) striking both § 1409(c) and (a) entirely; (2) severing the one-year continuous presence provision in § 1409(c) and requiring every unwed citizen parent to satisfy the more onerous ten-year requirement if

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*Amici Curiae Scholars on Statelessness in Support of Petitioner*, *Flores-Villar v. United States*, — U.S. —, 131 S. Ct. 2312, 180 L. Ed. 2d 222 (2010), 2010 WL 2569160.

[18] Recall that § 1409(a) incorporates the physical presence requirement from § 1401(a)(7), which applies to married parents of mixed citizenship.

the other parent lacks citizenship; or (3) severing the ten-year requirement in §§ 1409(a) and 1401(a)(7) and requiring every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement if the other parent lacks citizenship. In selecting among these three options, we look to the intent of Congress in enacting the 1952 Act. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 292 n.31, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987) ("[T]he Court must look to the intent of the . . . legislature to determine whether to extend benefits or nullify the statute."). For reasons we explain below, we conclude that the third option is most consistent with congressional intent.

We eliminate the first option with ease. The 1952 Act contains a severance clause that provides: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act . . . shall not be affected thereby." 1952 Act § 406; *cf. Nguyen*, 533 U.S. at 72, 121 S. Ct. 2053 ("[S]everance is based on the assumption that Congress would have intended the result."). The clause makes clear that only one of the provisions in § 1409, rather than both, should be severed as constitutionally infirm. It also means that our holding, which relates only to the application of these provisions to unmarried parents, should not be construed to affect the physical presence requirement for married parents.

We reject the second option—contracting, as opposed to extending, the right to derivative citizenship—with more circumspection. The Government urges us to adopt this option, arguing that the alternative allows the exception for unwed mothers to swallow the rule, thereby inflicting more damage to the statute's language and structure and reflecting a more radical change than the 1952 Congress intended. This argument fails for two reasons. First, the argument misunderstands our task, which is not to devise the "cleanest" way to alter the wording and structure of the statute, but to determine what result Congress intended in the event the combined statutory provisions were deemed unconstitutional. Second, the Government's argument neglects the historical background against which Congress enacted the relevant provisions. Although a close call, history does not convince us that the members of Congress passing the 1952 Act would have viewed the extension of the one-year requirement as a more radical change than the alternative, in which all unwed citizen parents must satisfy the ten-year age-calibrated requirement if the other parent lacks citizenship. To the contrary, the ten-year requirement for fathers and married mothers imposed by Congress in 1940 appears to have represented a significant departure from long-established historical practice. *See Rogers*, 401 U.S. at 823-26, 91 S. Ct. 1060 (reviewing the history of derivative citizenship statutes from the Act of March 26, 1790, 1 Stat. 103, through the 1952 Act and

concluding that "for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child"). From 1934 until the enactment of the 1940 Act, for example, women had the statutory right to confer citizenship on their foreign-born children and were required merely to have resided in the United States for *any* duration prior to the child's birth. The same bare-minimum requirement applied to men for the vast majority of the time since the founding, from 1790 until 1940. *See id.*; *Weedin*, 274 U.S. at 664-67, 47 S. Ct. 772; Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797; 1940 Act. Moreover, the 1952 Act's addition of a one-year continuous physical presence requirement for unmarried citizen mothers represented a relatively minor change in the baseline minimal residency requirement applicable to all men and women prior to 1940. On the other hand, of course, we recognize that the 1952 Congress, presumably with the benefit of this long history, nevertheless decided to retain the ten-year residency requirement. Whether this related to the emergence of the United States as a world power after World War II or an increasing number of children born of mixed-nationality parents, or some other set of factors, we cannot tell with confidence.

Neither the text nor the legislative history of the 1952 Act is especially helpful or clear on this point, and ultimately what tips the balance for us is the binding precedent that cautions us to extend rather than contract bene-

fits in the face of ambiguous congressional intent. *See, e.g.*, *Westcott*, 443 U.S. at 89, 99 S. Ct. 2655 ("In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." (citing *Jimenez v. Weinberger*, 417 U.S. 628, 637-38, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974), and *Frontiero v. Richardson*, 411 U.S. 677, 691 n.25, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973) (plurality opinion))); *Heckler*, 465 U.S. at 738, 739 n.5, 104 S. Ct. 1387; *Weinberger*, 420 U.S. at 641-42, 653, 95 S. Ct. 1225; *Soto-Lopez v. N.Y.C. Civil Serv. Comm'n*, 755 F.2d 266, 280-81 (2d Cir. 1985). Indeed, we are unaware of a single case in which the Supreme Court has contracted, rather than extended, benefits when curing an equal protection violation through severance.

Lastly, the Government contends that, in giving Morales-Santana the relief he seeks, we are granting citizenship, which we lack the power to do. This argument rests on a mistaken premise. Although courts have no power to confer "citizenship on a basis other than that prescribed by Congress," *Miller*, 523 U.S. at 453, 118 S. Ct. 1428 (Scalia, J., concurring), Morales-Santana has not asked us to confer citizenship, and we do not do so. Instead, Morales-Santana asks that we exercise our traditional remedial powers "so that the statute, free of its constitutional defect, can operate to determine whether citizenship was transmitted at birth." *Nguyen*, 533 U.S.

at 95-96, 121 S. Ct. 2053 (O'Connor, J., dissenting) (citing *Miller*, 523 U.S. at 488-89, 118 S. Ct. 1428 (Breyer, J., dissenting)); *cf. id.* at 73-74, 121 S. Ct. 2053 (Scalia, J., concurring). In other words, if Morales-Santana "were to prevail, the judgment in [his] favor would confirm [his] pre-existing citizenship rather than grant [him] rights that [he] does not now possess." *Miller*, 523 U.S. at 432, 118 S. Ct. 1428 (opinion of Stevens, J.). Correcting the constitutional defect here would at a minimum entail replacing the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c).[19] The alternative remedy suggested by the Government—that all unwed parents be subject to the more onerous ten-year requirement—would prove no less controversial: we have no more power to strip citizenship

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[19] When applied to unmarried parents, § 1401(a)(7) as modified would read:

> a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a *continuous period of one year*: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(first emphasis added to reflect change).

conferred by Congress than to confer it. Nor, finally, has Congress authorized us to avoid the question. *See* 8 U.S.C. § 1252(b)(5)(A) ("If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court *shall* decide the nationality claim." (emphasis added)). Conforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection, we conclude that Morales-Santana is a citizen as of his birth.

## CONCLUSION

For the foregoing reasons, we REVERSE the BIA's decision and REMAND for further proceedings consistent with this opinion.

## APPENDIX C

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

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File: A034 200 190 - Fishkill, NY Date: [Mar. 3, 2011]

In re: LUIS RAMON MORALES-SANTANA a.k.a. Luis Morales

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Laura A. Michalec
Assistant Chief Counsel

APPLICATION: Reopening

ORDER:

The respondent's motion is untimely filed and number-barred and has not been shown to qualify for any exception to the filing requirements imposed on motions to reopen removal proceedings. *See* sections 240(c)(7)(A), (C)(i) of the Immigration and Na-

tionality Act, 8 U.S.C. §§ 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2). Moreover, the evidence submitted along with the respondent's present motion does not demonstrate an exception to the physical presence requirement for purposes of demonstrating that he derived United States citizenship from his father. *See* former section 301 (a)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1401(a)(7). While former section 301(a)(7) of the Act provides that a citizen parent's period(s) of employment with the United States government or with an international organization may be included in order to satisfy the physical presence requirement, that the respondent's father was employed by a multinational apparently United States owned company does not demonstrate that the respondent's father was employed by the United States government. Nor does the record contain any evidence indicating that such company was an international organization within the meaning of the International Organizations Immunities Act, which only applies to international organizations in which the United States participated pursuant to a treaty or act of Congress. *See* 22 U.S.C. § 288; *see also* former section 301(a)(7) of the Act. Nor, as the respondent concedes, was his father absent for a period of less than 60 days, which might have been considered in calculating the continuity of his father's period of physical presence. Consequently, the respondent

cannot satisfy the physical presence requirement for purposes of demonstrating that he derived citizenship from his father.

On this record, the respondent has not provided us with an adequate reason to overlook the fact that his motion is untimely and number-barred. Accordingly, the respondent's motion is denied.[1]

/s/ NEIL P. MILLER
NEIL P. MILLER
FOR THE BOARD

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[1] However, the respondent's appellate fee waiver request is granted. *See* 8 C.F.R. § 1003.8(a)(3).

## APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Fishkill, New York

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File No. A 34 200 190

LUIS RAMON MORALES-SANTANA, RESPONDENT

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Sept. 28, 2000

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**IN REMOVAL PROCEEDINGS**

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CHARGE: Immigration and Nationality Act Section 237(a)(2)(A)(ii); Sections 237(a)(2)(C), alien convicted of an aggravated felony and an alien convicted of a violation of the law related to possession of a firearm

APPLICATIONS: Article 3 of the Convention Against Torture

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Ada Guerrero Guillod, Esq.

## ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 38-year old male, native and citizen of the Dominican Republic who entered the United States in 1975 as a lawful permanent resident. The respondent was convicted on May 17, 1995, of burglary in the first degree, robbery in the second degree on two counts, four counts of attempted murder and criminal possession of a weapon in the second degree.

The Notice to Appear was issued on March 15, 2000 charging the respondent with removability pursuant to the above captioned provisions of the Immigration and Nationality Act. The respondent appeared pro se and admitted the allegations of fact contained in the Notice to Appear and conceded removability.

In support of its allegations, the Immigration Service provided a copy of the respondent's immigrant visa, conviction record and appellate affirmance. Based on respondent's admissions, the only evidence of record, the alien's removability has been established by evidence which is clear and convincing to the charges set out in the Notice to Appear.

The respondent designated the Dominican Republic as the country of removal and requested political asylum from the Dominican Republic. The respondent is not eligible for political asylum because of his conviction for at-

tempted murder. A sentence in excess of five years incarceration statutorily bars him from political asylum and withholding of removal. He is only eligible for Convention Against Torture relief as there is no bar on that based on crime or sentence.

The respondent filed an application for political asylum which is Exhibit Number 7. He is not eligible for adjustment of status as it requires a waiver which is not available to him as an alien convicted of attempted murder.

The respondent submitted an application for political asylum in which he basically makes three claims for relief. He testified that he was mentioned in an article as someone who is a leader of a gang who terrorizes and tortures Dominican businessmen here in the United States and he testified that because of that article which came out in May 1993, the police would know him and the police and private businessmen would torture him if he went back to the Dominican Republic.

His second ground for fearing return to the Dominican Republic is that he started his own religion and the new religion criticized the basis foundations of Christianity and on that basis everybody would want to torture him.

I had the opportunity to observe the testimony and demeanor of the respondent. I believe that the respondent is severely psychologically disturbed. Without be-

ing a psychiatrist, it's clear that this respondent is not in contact with reality. Nothing in his testimony was credible, although I do believe he's Dominican and I do believe he was convicted as alleged.

The burden of proof is on the respondent to prove that it is more likely than not he would be tortured if he returned to the Dominican Republic. There is no evidence that this would happen. Identifying everyone in the world as a potential torturer identifies no one.

The respondent could not be returned to the Dominican Republic for the next 13 years because of his conviction and his sentence is not before 2013. It's extremely unlikely that anything that this respondent did in 1993 would be remembered in 2013 by anybody in the Dominican Republic, particularly newspaper articles or manifestos as to his political opinion or new religion.

The respondent left the courtroom and refused to continue prior to the issuance of this order and the respondent is deemed to have abandoned his application, but this order is being issued any how in case it's deemed that the respondent does have the right to appeal which the Court believes is not the case.

Therefore, upon consideration of whether the respondent is deemed to be treated in absentia or as being present, the following order will be entered:

## ORDER

IT IS ORDERED that the respondent's request for relief under Section 3 of the Convention Against Torture is hereby denied and the respondent shall be removed from the United States to the Dominican Republic on the charges contained in the Notice to Appear.

/s/ MITCHELL A. LEVINSKY
MITCHELL A. LEVINSKY
Immigration Judge

## APPENDIX E

1. 8 U.S.C. 1401 (1958) provided:

**Nationals and citizens of United States at birth.**

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe. *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one

year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[1] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however*, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

---

[1] So in original. Probably should read "United States".

2. 8 U.S.C. 1409 (1958) provided:

**Children born out of wedlock.**

(a) The provisions of paragraphs (3)-(5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 1401(a)(7) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and prior to the effective date of this chapter, as of the date of birth, if the paternity of such child is established before or after the effective date of this chapter and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such

person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

Supreme Court, U.S.
FILED
MAY 23 2016
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No. 15-1191

IN THE

# Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

*Petitioner,*

v.

LUIS RAMON MORALES-SANTANA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether sections 301 and 309 of the Immigration and Nationality Act of 1952 violate the Fifth Amendment's guarantee of equal protection by requiring unwed citizen fathers to satisfy substantially more burdensome physical presence requirements than unwed citizen mothers in order to transmit derivative citizenship to their foreign-born children.

2. Whether the court of appeals properly remedied the equal protection violation by extending to unwed citizen fathers of foreign-born children the same rights available to similarly situated unwed citizen mothers.

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## INTRODUCTION

The government does not dispute that sections 301 and 309 of the Immigration and Nationality Act of 1952 discriminate on the basis of gender by making it more difficult for unwed citizen fathers than unwed citizen mothers to confer derivative citizenship on their children born abroad. While the government seeks review in an effort to justify that discrimination, the court of appeals correctly held below that no such justification is possible. As the court explained in its exhaustive and unanimous decision (Pet. App. 3a-41a & Opp. App. 1a), the statutory scheme fails the applicable level of intermediate scrutiny because it does not advance any actual and substantial government purpose. The decision below, because plainly correct, does not warrant this Court's plenary review.

This Court's prior affirmance, by equally divided vote, of a contrary court of appeals ruling in *Flores-Villar v. United States*, 564 U.S. 210 (2011), does not support a grant of the current petition. The court of appeals' decision in that case lacked the benefit of subsequent historical analysis and scholarship demonstrating that Congress's *actual* purpose in enacting the discriminatory scheme was to provide more favorable treatment to unwed citizen mothers based on archaic and overbroad stereotypes about the roles of mothers and fathers in the lives of non-marital children. Far from seeking to ensure a U.S. connection or prevent statelessness, as the government asserts, Congress simply assumed that unwed mothers, not unwed fathers, would be the primary caretakers of foreign-born non-marital children and thus sought to protect such mothers from possible separation from

their children through preferential derivative-citizenship provisions. In light of this compelling historical evidence, which renders obsolete the conclusions reached without analysis by the court of appeals in *Flores-Villar*, the current split of authority is likely to resolve itself without this Court's intervention.

The government also seeks review of the remedy ordered by the court of appeals, but there is no split among the lower courts on that issue. All courts that have considered the issue have held that the appropriate remedy is to extend to unwed fathers the statutes' more favorable treatment of unwed mothers. Nor, contrary to the government's assertion, did the court exceed its authority in so ordering. Thus, review is not warranted on the second question presented.

Finally, even if the Court were inclined to consider the constitutionality of the relevant statutory provisions for a second time, this case is a poor vehicle for doing so. Because of the unique circumstances of Respondent Luis Ramon Morales-Santana's and his father's history, there are multiple alternative, substantial statutory grounds for affirming the decision below While the court of appeals rejected those grounds (Pet. App. 10a-13a), Respondent may raise them and this Court would have to reach them before affirming or reversing the judgment below. The existence of those alternative grounds for affirmance weighs strongly against granting the petition.

For these reasons, the petition should be denied. In the alternative, because the decision below is clearly correct, the Court should grant the petition and summarily affirm.

## COUNTERSTATEMENT

1. The court of appeals rendered its unanimous decision after an extraordinarily prolonged and exhaustive briefing process. After reviewing the parties' full briefing and hearing oral argument, the court of appeals ordered two rounds of supplemental briefing.[1] The court of appeals then remanded the case to the U.S. District Court for the Western District of New York for further fact-finding.[2] The court of appeals then ordered further supplemental briefing as to whether the legislative history showed that the drafters intended to treat unwed citizen mothers more favorably than unwed citizen fathers based on gender stereotypes about parental roles.[3] The government

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[1] See C.A. Dkt. 122 (Apr. 11, 2013) (directing the filing of supplemental letter briefs on (1) the legislative history of the 1940 Act and 1952 Act, and (2) whether the case should be remanded to the BIA to determine if Morales-Santana's father satisfied the one-year continuous residency requirement of Section 309(c)); C.A. Dkt. 135 (June 27, 2013) (directing the government to file a supplemental letter addressing whether the government concedes that Morales-Santana's father was a U.S. national at the time of his birth and had been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to Morales-Santana's birth).

[2] C.A. Dkt. 140-1 (July 16, 2013) (remanding the case to the district court to determine whether Morales-Santana's father would satisfy the one-year continuous presence requirement of Section 309(c) if it applied to him).

[3] C.A. Dkt. 163 (Oct. 8, 2014) (directing the filing of supplemental letter briefs on (1) whether Congress had, as an actual legislative purpose for enacting Sections 301 and 309 of the 1952 Act, the goal of providing against the separation of mothers from their children, and (2) if so, whether the provisions survive scrutiny under the equal protection guarantee of the Fifth Amendment).

thus had ample opportunity below to provide evidence supporting the arguments now made in the petition.

**2.** From 1790 to 1934, consistent with common law notions of coverture, citizenship legislation concerning children born abroad focused only on fathers with no mention of mothers. Such legislation granted U.S. citizenship to foreign-born children as long as the father had resided in the United States prior to the birth of the child. See *Rogers v. Bellei*, 401 U.S. 815, 823-26 (1971). Despite the paternal focus of those early citizenship statutes, the State Department in practice granted citizenship to foreign-born children of *unmarried* U.S.-citizen mothers. See *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing on H.R. 6127 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 43 (1945) (the "1940 Act Hearings").

In 1934, Congress altered the citizenship laws to allow derivative citizenship to be conferred on a non-marital child born abroad as long as the child's U.S.-citizen parent—mother *or* father—resided in the United States for any period of time before the child's birth. See Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797

**3.** The Nationality Act of 1940, ch. 876, 54 Stat. 1137 (the "1940 Act") made significant changes to the pre-1940 regime by permitting unwed fathers to confer derivative citizenship only if they satisfied a ten-year, age-calibrated U.S. physical-presence requirement before the child's birth. 1940 Act § 201(g). By contrast, the 1940 Act permitted unwed mothers to confer derivative citizenship as long as they had resided in the United States for any period of time prior to the child's birth. *Id* § 205.

The Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (the "1952 Act") preserved the basic structure of the 1940 Act. Like the 1940 Act, the 1952 Act imposed far less onerous derivative-citizenship restrictions on unwed mothers than on unwed fathers. Under Section 309(c) of the 1952 Act, a child born abroad to an unwed citizen mother obtained U.S. citizenship at birth if the mother was ever physically present in the United States for a continuous period of one year, at any time and at any age (even at her birth) before her child was born.

By contrast, Section 301(a)(7) of the 1952 Act—the statute in effect when Respondent was born—provides that a child born abroad to an unwed citizen father may obtain U.S. citizenship at birth only if the father: (1) was physically present in the United States (or one of its outlying possessions) for a period of ten years, five of which were after he turned fourteen; and (2) subsequently legitimated the child. Under this framework, an unmarried citizen father under the age of nineteen could never confer citizenship on his foreign-born child.

4. Respondent's father was born in the U.S. outlying possession of Puerto Rico on March 19, 1900, and acquired U.S. citizenship pursuant to the Jones Act. See Jones Act of Puerto Rico, ch. 145, 39 Stat. 951 (codified at 8 U.S.C. § 1402 (1917)). He was physically present in Puerto Rico until February 27, 1919, just 20 days shy of his nineteenth birthday, when he left for the then U.S.-occupied Dominican Republic to work for a U.S. company. Pet. App. 6a.

Respondent was born in the Dominican Republic on June 15, 1962. His father was by then a U.S. citizen but his mother was Dominican. His parents married in 1970 when he was eight years old, thereby

legitimating him, and they moved to the United States when Respondent was thirteen. Now 53 years old, Respondent has lived in the United States as a lawful permanent resident for more than 40 years.

5. On March 15, 2000, the INS charged Respondent with removability and he was ordered removed to the Dominican Republic. Pet. App. 45a-49a. On appeal, the Board of Immigration Appeals rejected Respondent's argument that he obtained derivative citizenship through his father. Because his father left Puerto Rico 20 days before his nineteenth birthday, he fell a mere 20 days short of satisfying Section 301(a)(7)'s physical presence requirements and therefore was not permitted to transmit derivative citizenship to Respondent. Pet. App. 42a-44a.

Respondent filed a petition for review to the U.S. Court of Appeals for the Second Circuit. In its decision dated July 8, 2015 and amended October 30, 2015 (Pet. App. 3a-41a & Opp. App. 1a), the court held that the discriminatory scheme is unconstitutional under the Fifth Amendment and that that the proper remedy is a determination that Respondent obtained U.S. citizenship at birth.

The court of appeals first held that Sections 301(a)(7) and 309(a), (c) of the 1952 Act discriminate based on the gender of the citizen parent, in violation of the Fifth Amendment's guarantee of equal protection. After determining (Pet. App. 16a-20a) that intermediate scrutiny supplies the proper standard of review, the court applied that standard and found that the government's proffered rationales could not sustain the challenged gender discrimination. Based on meticulous analysis of the statutory text and legislative history, the court concluded that: (1) while there is a important interest in ensuring that foreign-

born children have a connection to the United States, the differential treatment of unwed mothers and unwed fathers is not substantially related to that interest (Pet. App. 21a-25a); and (2) while reducing the risk of statelessness for foreign-born children is also an important governmental interest, there is no evidence that Congress was motivated by that concern in enacting its gender-based physical presence requirements (Pet. App. 25a-32a), an analysis the court found confirmed (Pet. App. 32a-34a) by the contemporaneous availability of effective gender-neutral alternatives. To the contrary, the court of appeals concluded (Pet. App. 31a & n.13), Congress's actual purpose in adopting a gender-discriminatory physical presence requirement appears to have been to act upon gender stereotypes about the different roles, abilities, and social expectations of mothers and fathers in relation to their non-marital children.

Turning to the question of how to remedy the equal protection violation (Pet. App. 35a-41a), the court of appeals held that unmarried citizen fathers were entitled to the same statutory rights available to similarly situated unmarried citizen mothers. Because there is no dispute that Respondent's father satisfied the requirements applicable to unwed citizen mothers, the court of appeals held that "Morales-Santana is a citizen as of his birth." Pet. App. 41a.

## REASONS FOR DENYING THE WRIT

### I. THE PETITION DOES NOT WARRANT PLENARY REVIEW

#### A. Any Circuit Split On The First Question Presented May Be Resolved Without This Court's Intervention

Contrary to the government's suggestion (Pet. 30), this Court's review is not necessary to resolve a split of authority on the underlying equal protection question. As the decision below acknowledges (Pet. App. 22a & 34a n.17), it departs from that of the Ninth Circuit in *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 564 U.S. 210 (2011). But the difference between the two decisions is explained by a significant disparity in the extent and quality of information considered by the two courts concerning Congress's actual purpose in enacting the discriminatory scheme at issue, much of which has come to light since *Flores-Villar* was decided. The Ninth Circuit is likely to have ruled the same as the Second Circuit did if the record before it had contained that same information at the time of its decision.

That information confirms that the 1952 Act's disparate treatment of unwed mothers' and unwed fathers' ability to confer derivative citizenship on their children born abroad was not motivated by the rationales the government asserts—*i.e.*, ensuring a connection between the child and the United States, and reducing the risk of statelessness. The discriminatory treatment instead reflects gender stereotypes regarding fathers' and mothers' respective parental roles in the lives of their non-marital children. Any such archaic and overbroad stereotypes

cannot provide a substantial justification for a gender-discriminatory statutory scheme.

As the court of appeals observed below (Pet. App. 22a), the Ninth Circuit's decision in *Flores-Villar* "provided no explanation for its conclusion" that the "'residence differential ... furthers the objective of developing a tie between the child, his or her father, and this country'" (quoting *Flores-Villar*, 536 F.3d at 997). As the decision below also noted (Pet. App. 34a n.17), the Ninth Circuit simply "assumed, *sub silentio*" that Congress enacted the differential physical presence requirements out of a concern for reducing the risk of statelessness for foreign-born children.

The Second Circuit decision below, by contrast, rests on a thorough review and analysis of legislative and executive records relating to the statutes at issue, as well as on intervening scholarship that exhaustively traces the history and origin of the statutes, rules, and agency practices governing the citizenship status of children born to U.S.-citizen parents outside of the United States. See Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race and Nation*, 123 Yale L.J. 2134 (2014) (cited at Pet. App. 28a n.9; Pet. App. 31a nn.13 & 14). Those records and research make clear that the discriminatory physical presence requirements were based not on the rationales the government asserts (Pet. 12-24), but rather on Congress's reflexive assumption that non-marital children are generally cared for by their mothers. Congress thus lowered the requirements for U.S.-citizen mothers to confer derivative citizenship on their non-marital foreign-born children in order to make it easier for those mothers to return to the United States

without separating from their children. See Pet. App. 31a & n.13 (citing Collins, 123 Yale L.J. at 2203, 2205).

Had the Ninth Circuit had before it all the historical, archival and scholarly materials presented to the Second Circuit in the extensive briefing and supplemental briefing below, it likely would have reached the same conclusion as the Second Circuit. Specifically, it likely would have concluded that the statutes' disparate treatment of unwed mothers and unwed fathers has nothing to do with ensuring adequate ties between foreign-born children and the United States or with reducing statelessness, and instead is based on impermissible gender stereotypes that cannot sustain the statutes.

Indeed, as a result of the Second Circuit's thorough analysis, other courts confronting the same issue have rejected the Ninth Circuit's holding in *Flores-Villar* in favor of the Second Circuit's decision below. In a recent case before the U.S. District Court for the Western District of Texas, for example, the district court considered the constitutionality of the same statutory scheme at issue here. See *Villegas-Sarabia v. Johnson*, 123 F Supp. 3d 870 (W.D. Tex. 2015), appeal filed, No. 15-60639(L), (5th Cir. Oct. 19, 2015) (briefing scheduled to be completed by July 27, 2016). After analyzing both *Flores-Villar* and the court of appeals' decision below, the district court rejected *Flores-Villar* and adopted the Second Circuit's holding that the discriminatory provisions violate the Fifth Amendment's equal protection guarantee. Thus, no circuit (and no district court outside of the Ninth Circuit) has approvingly cited *Flores-Villar* in the eight years since it was issued, but other lower courts began following the Second Circuit's decision below soon after its issuance.

This Court thus need not intervene in order to resolve the circuit split. The more prudent course is to allow the Ninth Circuit to reconsider its holding in *Flores-Villar* in light of the new evidence obtained from the relevant legislative, executive, and historical record set forth in the Second Circuit's decision, and to afford the Ninth Circuit "an opportunity to correct its error without the need for this Court to intervene." *Hittson v. Chatman*, 135 S. Ct. 2126, 2128 (2015) (Ginsburg, J., concurring in the denial of certiorari); see also Stephen M. Shapiro et al., SUPREME COURT PRACTICE ch. 6.37(i)(1), at 505 (10th ed. 2013) (denial warranted where it is "reasonable to expect that the courts that rendered [conflicting decisions] would reconsider their results in light of intervening developments").

### B. There Is No Split Among The Lower Courts On The Second Question Presented

The second question presented likewise does not warrant review. There is no conflict among the lower courts as to the appropriate remedy for the equal protection violation here. In *Flores-Villar*, the Ninth Circuit upheld the statutory scheme as constitutional and therefore did not reach the remedy issue.[4] The

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[4] Had the Ninth Circuit found a constitutional violation, it likely would have agreed with the Second Circuit on the appropriate remedy. See *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1418 (9th Cir. 1993) (upon finding an equal protection violation in a statute that allowed citizen fathers, but not citizen mothers, to transmit citizenship to foreign-born children, holding that the court could "utilize traditional constitutional remedies to rectify constitutional violations" and thus "redress [the statute's] impermissible gender-based discrimination by extending to

decision below is the *only* court of appeals decision to have addressed the appropriate remedy for the equal protection violation embodied in Sections 301 and 309. And the only district court to have considered the issue in light of the research and evidence now available reached the same conclusion as the court of appeals below. See *Villegas-Sarabia*, 123 F Supp. 3d at 894 ("[T]he Court finds that extension of the one-year continuous presence requirement to unmarried citizen fathers is the appropriate remedy for the equal protection violation here."). The absence of conflict among the lower courts weighs strongly against the Court's consideration of the second issue presented.

## II. THE DECISION BELOW IS CORRECT

Review should be denied for the additional reason that the decision below is correct in both its finding of unconstitutionality and the remedy it ordered for that defect. To begin with, the court of appeals properly applied the intermediate scrutiny to which laws that discriminate on the basis of gender are subject. See *United States v. Virginia*, 518 U.S. 515, 524 (1996). The government misplaces reliance (Pet. 9-12) on *Fiallo v. Bell*, 430 U.S. 787, 794 (1977), for the proposition that the court of appeals should have applied a rational-basis standard of review. *Fiallo* involved Congress's plenary authority over immigration laws affecting *non*-citizens, and is thus inapplicable here for the reasons this Court explained in *Miller v. Albright*, 523 U.S. 420 (1998): "unlike the petitioners in *Fiallo*, [Morales-Santana] is not [an alien] challenging the denial of an application for special status. [He] is

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citizen mothers the same rights as those possessed by citizen fathers to transmit their citizenship to their children").

contesting the Government's refusal to register and treat [him] as a citizen." *Id.* at 432 (citation omitted).

The court of appeals likewise correctly applied intermediate scrutiny in holding that the government failed to show that the gender-discriminatory scheme here is substantially related to an actual and important governmental purpose. Based on its extensive analysis of the statutes' legislative history, the court of appeals properly concluded that the discriminatory scheme violates equal protection because it does not serve actual and important governmental interests but rather reflects and embodies stereotypes about the roles of mothers and fathers in the lives of non-marital children. The court of appeals also properly remedied the equal protection violation by extending to unwed fathers the same treatment the statute affords unwed mothers.

### A. The Court of Appeals Correctly Held That The Statutory Scheme Violates The Equal Protection Guarantee Of The Fifth Amendment

The petition advances two rationales for the discriminatory scheme: (1) ensuring a connection between a foreign-born child and the United States and (2) preventing that child's possible statelessness. The court of appeals correctly held that the government failed to demonstrate that the discriminatory provisions embody or substantially advance either of those rationales. The legislative record, mismatch between the classification and asserted purposes, and availability of effective gender-neutral alternatives all support that conclusion and warrant denial of the petition.

### 1. The Discriminatory Scheme Is Not Substantially Related To Ensuring A U.S. Connection

While establishing a connection between a citizen parent's foreign-born child and the United States may well be an important governmental interest, the *discriminatory* physical presence requirements at issue here fail to substantially serve that interest, as the court of appeals correctly held (Pet. App. 21a-25a). The government does not offer (Pet. 12-16) any persuasive reason to suppose otherwise. Nor could it, for as the court of appeals correctly noted (Pet. App. 22a), there is no reason to suppose "that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad." On the government's theory, unwed citizen mothers can transmit U.S. values to their foreign-born children after being present in the United States for just *one year* at any point in the mother's life (even during infancy), but unwed citizen fathers require *ten years* of presence in the United States to do the same (five of which must be after the father turns fourteen).

The government fails in its efforts to offer *post hoc* support for its supposed U.S.-connection rationale. The petition asserts (at 5, 13-14) that the statutory gender discrimination at issue reflects the "reality" that a mother is "typically" the only "legally recognized parent" to a non-marital child at the time of birth. But this Court's decisions foreclose the government's reliance upon a "typical," "general," or "majority" practice in other nations to justify gender discrimination. Empirical evidence often comports with gender stereotypes, but cannot justify their legal embodiment. See

*J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127, 139 n.11 (1994) ("Even if a measure of truth can be found in some of the gender stereotypes used to justify [the practice at issue], that fact alone cannot support discrimination on the basis of gender."); *Craig v. Boren*, 429 U.S. 190, 201-04 (1976) (similar).

Moreover, the government cites but a single source to support its assertion (Pet. 21) that "the only parent legally recognized as the [non-marital] child's parent at the time of the birth usually was the mother," and that source does not remotely support the government's assertion. The source is Durward V Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935). The pages cited in the petition (Pet. 19 n.10, 21 (citing Sandifer, 29 Am. J. Int'l L. at 258-59 & n.38)) provide a survey of the citizenship laws in 79 countries. That survey revealed that only 29 of the countries studied had laws assigning the mother's nationality to non-marital children, while "about half" of the countries studied had no specific laws governing the citizenship of non-marital children. Sandifer, 29 Am. J. Int'l L. at 258. Contrary to the government's suggestion, the article says nothing at all regarding the separate issue of whether unwed mothers are the only "legally recognized" parents at birth in most countries.

In any event, even if the petition's version of "reality" were correct, it still would not explain why unwed citizen mothers require less physical presence in the United States than unwed citizen fathers in order to achieve Congress's purported interest in establishing a connection between the foreign-born child and the United States. Nor is there any evidence that Congress actually considered this purported

"reality" as its basis for enacting the discriminatory scheme.

### 2. The Discriminatory Scheme Did Not Have As Its Actual Purpose The Avoidance Of Statelessness

The petition asserts (Pet. 16-19) a second purported justification for the discriminatory scheme: the prevention of foreign-born children's potential statelessness. But as the court of appeals correctly held (Pet. App. 25a-32a), the government falls far short of meeting its burden to demonstrate that reducing the risk of statelessness was an actual purpose of the discriminatory requirements.

The court of appeals gave the government multiple opportunities—including in several rounds of post-argument supplemental briefing—to produce evidence supporting its statelessness rationale, but the government was unable to produce a single source confirming that the discriminatory scheme was intended to reduce the risk of statelessness. That is not surprising given that the statutes' physical presence requirements make it more difficult to confer U.S. citizenship on foreign-born children and thus are more likely to *increase* the incidence of statelessness than they are to reduce it.

The petition cites only two sources to support its argument that the discriminatory physical presence requirements were intended to reduce the risk of statelessness: a Senate Report issued in conjunction with the 1952 Act, S. Rep. No. 82-1137, at 38-39 (1952) ("Senate Report"), and the Sandifer article discussed above. But neither source remotely supports the government's statelessness rationale.

1. The Senate Report mentions statelessness, but as the court of appeals correctly observed (Pet. App. 28a-29a n.10), it did not do so to explain the disparate physical presence requirements. It did so only in explaining a feature of the 1952 Act that made it easier for a foreign-born child to acquire nationality at birth: namely, a provision eliminating the condition that a citizen mother could transmit nationality to a foreign-born child only if the father failed to legitimate the child prior to the child's eighteenth birthday. As the court of appeals correctly noted (Pet. App. 28a-29a n.10), the Senate Report thus provides no justification for the 1952 Act's gender-discriminatory physical presence requirements.

Moreover, the Senate Report was issued in connection with the 1952 Act, which largely maintained the same discriminatory physical presence requirements first enacted in the 1940 Act, with the exception that the 1952 Act made it *more* difficult for unwed mothers to confer derivative citizenship. While the 1940 Act required only any period of physical residence, the 1952 Act imposed a one-year continuous physical presence requirement. Seeking to reduce the risk of statelessness by making it more difficult for unwed mothers to confer derivative citizenship would be an illogical and counterproductive approach. The Senate Report thus cannot justify the discriminatory physical presence requirements at issue here.

2. The only other source the petition relies on to support its statelessness rationale is the Sandifer article cited in the congressional hearings for the 1940 Act. The petition cites Sandifer in support of its assertion that unwed mothers of foreign-born children faced a greater risk than unwed fathers of having stateless children because "the laws of many other

countries would not extend citizenship to such a child born in that country" (Pet. 20) and "when a child was born out of wedlock, the only parent on whom a child's citizenship *at the time of birth* could be based in a *jus sanguinis* country was the mother," (Pet. 21) (emphasis in original). The government's reliance on Sandifer is misplaced for several reasons.

*First*, Sandifer cautioned that his study "does not ... purport to furnish a complete picture of the laws of any given country with respect to the subject included." Sandifer, 29 Am. J. Int'l L. at 249. In addition, Sandifer did not study the laws of *every* country, and it is not clear how he determined which countries to study. Thus, the Sandifer article cannot establish a purported "legal reality" in all nations outside of the United States.

*Second*, as discussed above, Sandifer observed that in "about half the states studied" there was *no* legislation governing the nationality of non-marital children. *Id.* at 258. Of the countries Sandifer studied, only 30—a minority—had laws that specifically provided for the nationality of non-marital children. *Id.* In 29 of those countries, non-marital children followed the mother's nationality, *but only* in the absence of acknowledgment or legitimation by the father—which could occur at or very soon after birth—in which case the child would be assigned the father's nationality. *Id.* at 258-59. And in at least one country studied by Sandifer, the law provided that a non-marital child would take the father's nationality regardless of acknowledgment or legitimation. *Id.*

*Third*, the risk of statelessness arises only when a child is born in a nation that exclusively follows the *jus sanguinis* rule of citizenship (*i.e.*, the rule that provides that a child takes the nationality of his or her

mother or father). In the many countries that follow the *jus soli* rule (*i.e.*, the rule that a child obtains the nationality of the country in which the child is born), there is no risk of statelessness. Sandifer observed that over 30 of the countries he studied followed some form of the *jus soli* rule that would eliminate the risk of statelessness for non-marital children. *Id.* at 249-50. Thus, Sandifer's article fails to support the government's argument (Pet. 19-21 & n.10) that there existed a worldwide "legal reality" that created a greater risk of statelessness for children of unwed mothers than it did for children of unwed fathers,

*Fourth*, although the Sandifer article was cited in the congressional report on the 1940 Act Hearings (see Pet. 19-20 n.10), the 1940 Act Hearings did not mention statelessness at all. Citation of the Sandifer article in that context thus cannot support any inference that statelessness concerns motivated the 1940 Act's discriminatory physical presence requirements.

In sum, neither the Senate Report nor the Sandifer article supports the petition's proffered statelessness rationale for the discriminatory physical presence requirements at issue.

### 3. Congress's Actual Purpose In Enacting The Discriminatory Scheme Rests On Archaic And Overbroad Gender Stereotypes

It is well settled that the justification for any gender classification "must be genuine, not hypothesized or invented post hoc in response to litigation." *Virginia*, 518 U.S. at 533; see Pet App. 16a. As discussed, the government's *post hoc* U.S.-connection and statelessness rationales fail to satisfy that requirement. To the

contrary, the legislative and administrative history of the 1940 Act make clear that Congress enacted the discriminatory physical presence requirements based on the actual purpose to reflect the gender-based stereotype that mothers, not fathers, are the primary caretakers of non-marital children. Congress therefore sought to make it easier for unwed U.S.-citizen mothers to return to the United States together with their children born abroad.

As one State Department representative put it, "it is well known that almost invariably it is the mother who concerns herself with the [non-marital] child. For this reason [the provision enacted as 1940 Act Section 205] as drawn up by the Committee slightly discriminates in favor of women . " Letter from J. Scanlan to R. Shipley, Chief, Passport Div., U.S. Dep't of State (Mar. 7, 1936) at 6. The statement of another State Department representative similarly demonstrates that, before the 1940 Act, the Department's policy of recognizing as U.S. citizens the foreign-born children of unwed U.S.-citizen mothers was based on the generally held view that "the mother 'has a right to the custody and control of [a non-marital] child as against the putative father, and is bound to control it as its natural guardian.'" 1940 Act Hearings, 76th Cong. 431 (citation omitted).

Recent scholarship confirms that the 1940 Act relied heavily on prevailing norms and stereotypes concerning the relative roles and responsibilities of mothers and fathers in parenting non-marital children. As the article cited prominently in the decision below states, "[m]emo after memo ... reveals U.S. officials' nearly uniform view that it was only practical to keep mothers and their non-marital children together, as mothers were the presumed caretakers of

such children." Collins, 123 Yale L.J. at 2202-03 (cited at Pet. App. 31a n.13).

The government ignores that scholarship in the petition, as it does the abundant legislative and administrative history upon which the court of appeals relied in reaching this conclusion. Moreover, in asserting (Pet. 20) that the court of appeals was merely "speculating" that the discriminatory physical presence requirements at issue "reflect gender-based generalizations," the government ignores that its own account of Congress's purported purposes in enacting the discriminatory scheme relies only upon unsupported inferences from a mere two documents.

In sum, the court of appeals' holding that the discriminatory physical presence requirements at issue were impermissibly based on gender-based stereotypes regarding the roles of mothers and fathers in the lives of non-marital children is amply supported by the court of appeals' extensive analysis of the historical record of the statutes at issue. That analysis also confirms that there is no evidence indicating that Congress actually had either of the government's proffered rationales in mind when it enacted the discriminatory scheme. Based on this analysis and the court of appeals' proper application of this Court's equal protection jurisprudence, the court of appeals correctly held that the discriminatory scheme violates the Fifth Amendment's guarantee of equal protection.

### B. The Court Of Appeals Properly Remedied The Statutes' Constitutional Defect

In order to remedy the equal protection violation, the court of appeals relied on this Court's well-established precedent favoring extension of the rights

at issue to the class of persons to which the rights previously were unconstitutionally denied. Thus, the court of appeals correctly held (Pet. App. 35a-41a) that both unwed mothers *and* unwed fathers may satisfy the statutes' physical presence requirements by residing in the United States for a continuous period of one-year at any point prior to the child's birth.

The government argues (Pet. 29) that extending the more lenient physical presence requirements to unwed fathers is contrary to legislative intent because "there is no basis for assuming that Congress necessarily would have preferred to let the exception swallow the rule." According to the government, the proper remedy is to impose on unwed mothers the more onerous physical presence requirements applicable to unwed fathers, thereby restricting, rather than extending, the benefit at issue. The government is incorrect.

*First*, the court of appeals' decision properly follows precedent requiring the government to remedy equal protection violations by leveling up rather than leveling down. See, *e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89-93 (1979) (affirming extension of benefits to children of unemployed women rather than terminating benefits to those Congress intended to benefit, *i.e.*, all children of the unemployed); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (proper remedy for denial of social security survivorship benefits was retroactive extension to men on terms previously reserved for women); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (similar as to widowers). As the court of appeals observed (Pet. App. 39a), the government was unable to identify "a single case in which the Supreme Court has contracted,

rather than extended, benefits when curing an equal protection violation through severance."

*Second*, imposing more onerous restrictions on unwed mothers' ability to confer derivative citizenship would only frustrate the interests that the government claims the statutory scheme was intended to advance. With respect to the government's asserted interest in ensuring a connection between the foreign-born child and the United States, for example, the relief ordered below is limited to children who have been acknowledged or legitimated by their U.S.-citizen fathers, and, by virtue of this relationship, are likely to have a strong connection to the United States.

The government's proposed remedy makes even less sense when considered in light of the government's asserted interest in reducing the risk of statelessness. Imposing on unwed mothers the more onerous physical presence requirements that the statutes impose on unwed fathers would only make it more difficult for unwed mothers to confer derivative citizenship on their foreign-born children, thereby *increasing* the risk of statelessness.

*Third*, contrary to the government's argument (Pet. 26-27), the court of appeals' remedy does not result in the court "granting" or "'conferr[ing]'" citizenship upon an individual who previously was not a citizen. Instead, the remedy below merely cures the constitutional defect by recognizing pre-existing citizenship. As the court of appeals correctly observed (Pet. App. 7a), "[u]nlike citizenship by naturalization, derivative citizenship exists as of a child's birth or not at all" (citing 8 U.S.C. § 1409(a), (c); *cf. id.* § 1101(a)(23)).

*Fourth*, the government missteps in asserting (Pet. 26) that the court of appeals' remedy would "have the

effect of granting U.S. citizenship (from birth) to an untold number of individuals" who "grew up with no expectation that they were citizens of the United States." The petition offers no evidence that the number of affected persons is significant; to the contrary, it concedes the number is "untold." Nor does the petition explain how recognizing such a group of U.S. citizens will affect any governmental interests.

*Finally*, the government's proposed remedy—subjecting unwed mothers to the age-calibrated, ten-year physical presence requirements that the statutes impose on unwed fathers—would potentially replace one constitutional violation with another by stripping derivative U.S. citizenship from foreign-born persons whose unwed citizen mothers did not satisfy those more onerous requirements. "In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship." *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967). Thus, it is not possible to retroactively strip citizenship from foreign-born U.S. citizens who obtained derivative citizenship at birth from unwed citizen mothers who satisfied the one-year physical presence requirement in the relevant time period.

The petition offers no basis for applying its proposed remedy only prospectively—nor could it, because the statutory scheme concerns citizenship *at birth* and remains in the current version of the INA (albeit in amended form). Moreover, a prospective remedy would conflict with this Court's precedent regarding the retroactive effect of remedies for constitutional violations. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that a ruling regarding unconstitutional racial discrimination under Fourteenth Amendment must "be applied retroactively to all

cases, state or federal, pending on direct review or not yet final, with no exception").[5]

### C. Summary Affirmance Is Warranted

As discussed, the court of appeals correctly held that the discriminatory physical presence requirements violate the Fifth Amendment's equal protection guarantee, and that the proper remedy is to extend to unwed fathers the more lenient requirements applicable to unwed mothers. The petition therefore should be denied.

In the alternative, because the court of appeals' decision is clearly correct, if the Court is inclined to grant the petition, it should summarily dispose of the case by affirming the decision below See, *e.g.*, Shapiro, SUPREME COURT PRACTICE ch. 5.12(a), at 344 (noting the Court's practice of summary affirmance "where the judgment below is thought to be so obviously correct and the conflicting decision so clearly wrong that the Court feels further consideration is unnecessary") (citing *United States v. Lane Motor Co.*, 344 U.S. 630, 631 (1953) (per curiam) (granting petition and summarily affirming to resolve circuit conflict on issue of statutory interpretation of Internal Revenue Code where "[w]e think it clear" the lower court's decision is correct)); see also *Lines v. Frederick*,

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[5] See also, *e.g.*, *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (recognizing "a general rule of retrospective effect for the constitutional decisions of this Court. Nothing in the Constitution alters the fundamental rule of retrospective operation that has governed judicial decisions for near a thousand years.") (citations and quotation marks omitted); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (giving judicial decisions full retroactive effect is "overwhelmingly the norm").

400 U.S. 18, 20-21 (1970) (granting petition and summarily affirming to resolve circuit conflict on issue of statutory interpretation of Bankruptcy Act).

## III. THIS CASE PRESENTS A POOR VEHICLE FOR RESOLVING THE CONSTITUTIONAL QUESTIONS PRESENTED

Even if the Court were to determine that the questions presented by the petition are otherwise worthy of review, the petition still should be denied because multiple alternative statutory grounds support the judgment. This case is therefore a poor vehicle for attempting to resolve the constitutional issues.

This Court has long recognized that, where an appeal presents both statutory and constitutional grounds for affirmance, the Court should avoid reaching the constitutional issue if possible by deciding the case on statutory grounds. See *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam) (declining to resolve Fourteenth Amendment issue where "[a]ffirmance on the statutory ground would moot the constitutional issues presented by the case"); *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963) (resolving immigration case on "threshold issue of statutory construction," which "obviat[ed]" the government's constitutional questions); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (Brandeis, J., concurring) ("[c]onsiderations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so").[6]

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[6] It is irrelevant that the court of appeals rejected these statutory grounds. See Pet. App. 10a-13a. Respondent is "free to

The availability of alternative statutory grounds for affirmance also weighs against granting a petition for certiorari. See *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 929 (2016) (Thomas, J., concurring in the denial of certiorari) (petition "raises threshold questions ... that *might* preclude us from reaching the [constitutional] question") (emphasis added); Shapiro, SUPREME COURT PRACTICE ch. 4.4(e), at 248 (where case can be decided on alternative ground, a "conflict itself may not be sufficient reason for granting review"). Here, two statutory bases for Respondent's derivative citizenship exist.

1. To receive derivative citizenship, Section 301(a)(7) of the 1952 Act required that, prior to Respondent's birth, his father had resided in the United States or a U.S. outlying possession for ten years, five of which were after he turned fourteen years old. During the relevant period, Puerto Rico was a U.S. outlying possession. Because Respondent's father was physically present in Puerto Rico for nearly all of his first 19 years, departing for the Dominican Republic only 20 days shy of his nineteenth birthday, this Court may find that Respondent's father substantially satisfied the requirements of Section 301(a)(7) on the ground that the 20 days his father spent outside of the United States is *de minimis* and not a basis for denying Respondent citizenship.

Numerous other physical presence requirements under immigration law incorporate "grace periods" to prevent the forfeiture of important rights due

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defend [his] judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

to *de minimis* absences. See, *e.g.*, 8 U.S.C. §§ 1229b(b)(1)(A), (d)(2) (continuous absences of 90 days, or fewer than 180 days in the aggregate, do not break "continuity" for physical presence); 1255a(a)(3)(B) ("brief, casual, and innocent absences from the United States" do not interrupt "continuous physical presence").

Such an approach is especially appropriate in this case, for absent such a reasonable grace period, it was *impossible* for Respondent's father to have passed derivative citizenship to his child merely because he had not yet reached the age of nineteen. Cf. *Fleuti*, 374 U.S. at 456 (interpreting immigration residency requirement, Court will "not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious" and "too irrational to square with the statutory scheme") (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)).[7]

**2.** In any event, the Dominican Republic was an "outlying possession" of the United States in 1919 when Respondent's father arrived from Puerto Rico,

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[7] The court of appeals rejected this argument (Pet. App. 10a) because: (1) the statute does not explicitly excuse *de minimis* absences; and (2) Respondent's father's 20-day absence was not a "gap," because he did not subsequently return to Puerto Rico. Neither justification holds. *First*, this Court has recognized implicit *de minimis* exceptions to immigration statutes where alternative constructions are excessively harsh. See, *e.g.*, *Fleuti*, 374 U.S. at 458 (return from day trip to Mexico not deemed "entry" under immigration law based on "policies underlying" statute). *Second*, whether the absence occurred in the middle or at the end of Respondent's father's physical presence in Puerto Rico has no bearing on whether the outcome is equitable. Moreover, Respondent's father *did* return to the United States, and lived here with Respondent and his mother until his death.

and thus the 20 days he spent there before his nineteenth birthday should not deprive him of the ability to confer derivative citizenship on Respondent.

Under the 1952 Act, the term "outlying possessions" included American Samoa, Swains Island, and "any other territory which was, in fact and law, an outlying possession of the United States during the period of the citizen parent's physical presence therein." *Matter of V-*, 9 I. & N. Dec. 558, 561 (BIA 1962). The United States' occupation of the Dominican Republic and its plenary control of its government from 1916 to 1924 demonstrate that the Dominican Republic should have been considered an outlying possession of the United States in 1919.

The United States formally occupied the Dominican Republic on November 29, 1916. See Bruce J. Calder, THE IMPACT OF INTERVENTION: THE DOMINICAN REPUBLIC DURING THE U.S. OCCUPATION OF 1916-1924, xxvii, 17 (2d ed. 2006). The commander of the U.S. Atlantic Fleet cruiser force (who was the soon-to-be Military Governor of the Dominican Republic) issued a Proclamation of the Military Occupation of Santo Domingo by the United States decreeing that the "Republic of Santo Domingo" was hereby "placed in a state of military occupation" and "made subject to military government and to the exercise of military law applicable to such occupation." *Proclamation of the Military Occupation of Santo Domingo by the United States*, 11 Supp. Am. J. Int'l L. 94, 95 (1917). In mid-December 1916, U.S. officials declared the Republic's recently adopted constitution illegal. See Calder, 18-19. On December 26, they suspended elections. *Id.* And on January 2, 1917, they suspended indefinitely the Dominican Congress. *Id.* In the words of the military government in 1920: "The United

States has conducted the customs administration of the Dominican Republic for the past fifteen years and the administration of the *entire government* for the past three years." *Santo Domingo: Its Past and Its Present Condition*, Pamphlet prepared by the Military Government of Santo Domingo 14 (Jan. 1, 1920) (emphasis added).

Thus, even if Respondent's father's 20-day period in the Dominican Republic were not treated as *de minimis* under Section 301(a)(7) (as it should be), Respondent's father still should be considered to have satisfied the statutory physical presence requirements because the 20-day gap was spent in the then-U.S. outlying possession of the Dominican Republic.[8]

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[8] The court of appeals held otherwise (Pet. App. 12a-13a) because: (1) there was no "treaty or lease" pursuant to which the Dominican Republic was acquired; and (2) the United States' military occupation of the Dominican Republic did not extinguish the latter's sovereignty. Such reasoning places form over substance. During the U.S. occupation of the Dominican Republic from 1916 to 1924, residents were ruled by a U.S. government that established U.S.-style institutions, reforms, taxes, and laws. Indeed, for a portion of that time, including 1919, U.S. citizens could enter the Republic without a passport. And assuming that the purpose of the 1952 Act's physical presence requirements was to promote in foreign-born children a connection to U.S. character and values, see *Matter of Y-*, 7 I. & N. Dec. 667, 669 (BIA 1958), the United States' plenary control over the Dominican government furthered that goal.

## CONCLUSION

The petition for a writ of certiorari should be denied, but if it is granted, the Court should summarily affirm.

Respectfully submitted,

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May 23, 2016

# APPENDIX

# APPENDIX

As noted in the Solicitor General's letter to the Court dated May 17, 2016, the appendix to the government's petition for a writ of certiorari contains an error. The petition appendix reproduces the opinion of the Second Circuit, as that opinion was printed in the Federal Reporter, at 804 F.3d 520. Pet. App. 3a-41a. The reported version of the opinion, however, erroneously omits nine words from the second full paragraph on page 529 of volume 804, which appears at page 20 of Court of Appeals' Certified Amended Opinion (Dkt. 206). The same words are likewise erroneously omitted from the full paragraph on page 20a of the petition appendix. That paragraph should read as follows, including the nine words in boldface print:

> For these reasons, we conclude that the gender-based scheme in §§ 1401 and 1409 can be upheld only if the Government shows that it is substantially related to an actual and important governmental objective. *See Virginia*, 518 U.S. at 531, 533, 535-36; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). In assessing the validity of the gender-based classification, moreover, **we consider the existence of gender-neutral alternatives to the** classification. *See, e.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr v. Orr*, 440 U.S. 268, 281 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975).

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No. 15-1191

# In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

*v.*

LUIS RAMON MORALES-SANTANA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

No. 15-1191

LORETTA E. LYNCH, ATTORNEY GENERAL PETITIONER

*v.*

LUIS RAMON MORALES-SANTANA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

The Second Circuit erroneously declared an important provision of an Act of Congress unconstitutional in a decision that creates an acknowledged circuit split. The court then compounded that error by granting U.S. citizenship to respondent, exceeding its constitutional and statutory authority in doing so. This Court previously granted review of the same questions, even in the absence of a circuit split—and even though the constitutionality of the relevant provisions of the governing Act of Congress had been upheld by the court of appeals. *Flores-Villar* v. *United States*, 564 U.S. 210 (2011) (per curiam) (affirming by an equally divided Court). *A fortiori*, review is warranted here, where the relevant provision has been held unconstitutional, particularly in light of the Constitution's call for "an uniform Rule of Naturalization"

to apply "throughout the United States." U.S. Const. Art. I, § 8, Cl. 4.

### A. Review Is Warranted Because An Act Of Congress Was Declared Unconstitutional

The court of appeals has held that an important provision of an Act of Congress is unconstitutional. That is a sufficient reason (though not the only reason) to grant the government's petition for a writ of certiorari. See, *e.g.*, *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998) ("Because the Court of Appeals' holding * * * invalidated a portion of an Act of Congress, we granted certiorari."); *FCC* v. *Beach Comm'ns, Inc.*, 508 U.S. 307, 313 (1993) (same); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.12, at 264 (10th ed. 2013) ("Where the decision below holds a federal statute unconstitutional * * * , certiorari is usually granted because of the obvious importance of the case."). Respondent does not even attempt to argue that the questions presented are not important. And this Court has already deemed the questions presented to be sufficiently important that it granted certiorari in *Flores-Villar*, *supra*, even in the absence of a circuit conflict.

### B. Review Is Warranted Because The Division Among The Courts Of Appeals Undermines The Uniform Nationwide System of Naturalization Called For In The Constitution

1. Respondent does not deny that the decision below created a conflict with the Ninth Circuit's decision in *United States* v. *Flores-Villar*, 536 F.3d 990 (2008), aff'd by an equally divided Court, 564 U.S. 210 (2011) (per curiam), on the first question presented. The Second Circuit acknowledged that its decision created

that conflict. Pet. App. 22a, 34a n.17. Respondent instead argues that this Court's review is not warranted because the circuit split "may be resolved without this Court's intervention." Br. in Opp. 8 (capitalization altered). In support of that assertion, respondent contends (*id.* at 8-11) that "[t]he Ninth Circuit is likely to have ruled the same as the Second Circuit did if the record before it had contained the same information at the time of its decision." Such speculation about what another court in a circuit split might do furnishes no basis for leaving unreviewed an appellate decision holding a statutory scheme unconstitutional.

In any event, respondent has no answer to the consequences of the division of authority created by the Second Circuit's decision. The Constitution calls for "an uniform Rule of Naturalization" to apply "throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Respondent does not acknowledge that constitutional command, let alone attempt to explain why the Court's intervention is not warranted to eliminate a regime in which different rules of naturalization apply in different parts of the United States. Moreover, administering a patchwork system of citizenship rules would require resolution of difficult questions not addressed by the court of appeals—*e.g.*, whether the applicable rule of citizenship should be determined based on where removal proceedings were instituted against a person who the governing Act of Congress deems to be an alien, where an alien not in removal proceedings files his application for a citizenship document, where in the United States an applicant's father was physically present during the relevant time, or some other basis. This office has been informed that, in 2015, the State Department issued

more than 15 million passport cards and books (domestically and at foreign posts). The administrative burden that would result from determining and then applying disparate rules in processing passport applications is reason enough for this Court's review.

2. Respondent's further contention (Br. in Opp. 11-12), that review of the second question presented is unwarranted because there is no division among the courts of appeals on that question, also should be rejected. As even respondent acknowledges (*ibid.*), the second question presented—concerning a court's authority to remedy an equal protection violation in this context—arises only when a court has already concluded that the statutory scheme violates equal protection. Because the Second Circuit is the only court of appeals to have reached that conclusion, it is the only court of appeals to choose a remedy. But the second question presented is of paramount importance because it addresses constitutional and statutory limits on a federal court's remedial authority. And review of that question is intertwined with the review of the first question presented, as suggested by this Court's decision in *Nguyen* v. *INS*, 533 U.S. 53 (2001), which, in rejecting an equal protection challenge to a related statutory provision, noted the "potential problems with fashioning a remedy." *Id.* at 72 (citation omitted.

### C. Review Is Warranted Because The Court Of Appeals' Decision Is Wrong

For the reasons explained in the government's certiorari petition, the court of appeals erred in holding that the statutory scheme at issue is unconstitutional. Respondent's contrary arguments are unpersuasive.

First, respondent contends (Br. in Opp. 12) that the court of appeals correctly applied heightened scrutiny notwithstanding this Court's decision in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), because "*Fiallo* involved Congress's plenary authority over immigration laws affecting *non*-citizens." Respondent ignores the fact (noted in the government's petition, see Pet. 12) that the plaintiffs in *Fiallo* included U.S. citizens, 430 U.S. at 790-791 n.3, who unsuccessfully argued that rational-basis review should *not* apply because the statutory provision at issue implicated "constitutional interests of United States citizens and permanent residents," *id.* at 794 (citation marks omitted).

Second, respondent argues (Br. in Opp. 14-16) that the different physical-presence or residence rules applicable to unwed U.S.-citizen mothers and unwed U.S.-citizen fathers under 8 U.S.C. 1409 (1958) did not further the important government objective of ensuring a sufficient tie between the United States and a child born abroad. Respondent simply ignores the government's explanation (see Pet. 13-16) that a child born abroad out of wedlock to a U.S.-citizen mother and an alien father was *not* similarly situated to such a child with a U.S.-citizen father and an alien mother. At the time of respondent's birth, a child born out of wedlock generally had only one legally recognized parent (his mother) at the moment of his birth—indeed, throughout the child's life unless and until his father legitimated him (typically through marriage). When a child had only one legally recognized parent and that parent was a U.S. citizen, there were no competing national interests through another parent, and Congress could reasonably conclude that a one-year period of continuous physical presence in the United

States by the U.S.-citizen parent would be adequate to ensure that the child would have a sufficient tie to the United States (through his or her parent). In contrast, when a child was born to married parents or when the father of a child born out of wedlock legitimated the child at some point after the child's birth, then the child had two legally recognized parents. When only one of those parents was a U.S. citizen, the child had competing claims on his national allegiance. In that circumstance, it was reasonable for Congress to require that the U.S.-citizen parent have a greater connection to the United States to warrant conferring U.S. citizenship on the child.

Indeed, because respondent's father legitimated him by marrying his mother eight years after respondent was born, the Act treats him the same as if his parents had been married when he was born. There is nothing unfair, much less unconstitutional, about that result. The Senate Report accompanying the 1952 amendments to the naturalization laws confirms this understanding of the statutory scheme, which is in any event evident on the face of the Act. That Report explained that, when the paternity of a child born out of wedlock is established before the child's 21st birthday, the child "acquires the citizenship status which it would have had at birth, if the birth had been legitimate." S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (Senate Report).

When enacting laws that will govern the granting of U.S. citizenship to individuals born outside the United States, Congress is entitled to act on the basis of existing laws—including the existing laws of other countries, which Congress has no authority to change. This Court has noted, moreover, that "mothers and

fathers of illegitimate children are not similarly situated." *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979). In particular, the Court has explained that, because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood," the application of "a different set of rules for making" the "legal determination" of that connection "is neither surprising nor troublesome from a constitutional perspective." *Nguyen* v. *INS*, 533 U.S. 53, 63 (2001).

Third, respondent argues (Br. in Opp. 16-19) that Congress was not actually motivated by a desire to reduce statelessness when it enacted and amended the statutory scheme at issue. Respondent is incorrect. As noted above, the legislative history shows that the provision that became 8 U.S.C. 1409(c) (1958) was intended to "insure[] that the child" of an unwed U.S.-citizen mother "shall have a nationality at birth." Senate Report 39; see Pet. 17-19.

Respondent further errs in arguing (Br. in Opp. 18-19) that the scholarly survey of other countries' citizenship laws that preceded Congress's passage of the Nationality Act of 1940, ch. 876, 54 Stat. 1139, did not in fact support Congress's concerns about statelessness because the article's conclusions did not apply "worldwide." As this Court explained in *Nguyen*, in the course of rejecting an equal protection challenge to a similar statutory scheme, even under heightened scrutiny, "[n]one of [the Court's] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance," particularly in the "difficult context of conferring citizenship on vast numbers of persons." 533 U.S. at 70.

Fourth, respondent errs in asserting (Br. in Opp. 19-21) that the court of appeals held that Congress was motivated by discriminatory gender stereotypes when it enacted and amended the challenged scheme. The court of appeals neither accepted nor rejected respondent's stereotype argument, see Pet. App. 31a, and respondent's reliance on it misapprehends the basis for the statutory scheme he challenges, compare *Nguyen*, 533 U.S. at 63 (concluding that "impos[ing] a different set of rules for making th[e] *legal* determination" of the identity of an out-of-wedlock child's mother or father is "no[t] troublesome from a constitutional perspective" because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood") (emphasis added).

Finally, respondent errs in arguing (Br. in Opp. 21-26) that the court of appeals imposed a proper remedy for the constitutional violation it found by granting citizenship to respondent. Respondent is incorrect (*id.* at 22) that this Court's cases "requir[e] the government to remedy equal protection violations by leveling up rather than leveling down." Although some cases call for extending the benefit sought by a plaintiff rather than contracting it, this Court has left no doubt that, as a general matter, when a court sustains an equal protection claim, it has "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (citation omitted; brackets in original); see *Miller* v. *Albright*, 523 U.S. 420, 458 (1998) (Scalia, J., concurring in the judgment).

In light of this Court's holdings that "the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers," *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917), the Second Circuit's only remedial option in this case was to declare invalid the exception in Section 1409(c) that creates the one-year continuous-physical-presence requirement for unwed U.S.-citizen mothers. That remedy would be consistent with congressional intent. See Pet. 28-29. Respondent's observation (Br. in Opp. 23) that such a remedy would undermine Congress's goal of reducing the risk of statelessness ignores the fact that the remedy the court of appeals imposed undermines Congress's goal of ensuring that the parent of a child born abroad has established sufficient ties to the United States through significant physical presence when the child has another legally recognized parent who is an alien. Because the court of appeals declared unconstitutional the scheme that Congress chose to balance its competing interests, no remedy can equally serve those interests. Respondent's additional argument (*id.* at 24) that the government's proposed remedy would strip individuals of U.S. citizenship ignores the fact (acknowledged by respondent in the very next paragraph) that the government would seek application of the longer physical-presence requirement only on a prospective basis. In any event, respondent's protest rings hollow because the court of appeals' remedy could have the same effect unless applied prospectively. See Pet. 26-27 n.12.

**D. This Case Is An Appropriate Vehicle For Reviewing The Questions Presented**

Finally, respondent argues (Br. in Opp. 26-30) that this case is a poor vehicle for deciding the questions presented. He relies on statutory arguments, rejected by the court of appeals, that he is a citizen from birth because his father satisfied the ten- and five-year physical-presence requirements in 8 U.S.C. 1401(a)(7) (1958) for respondent to be a citizen as of his birth. The existence of those alternative arguments is no obstacle to this Court's review of the Second Circuit's erroneous constitutional holding.

First, respondent's non-constitutional arguments do not stand in the way of this Court's review of the questions presented because, as the Second Circuit correctly held, they are meritless. Briefly, respondent argues (Br. in Opp. 27-28) that his father, who was born in Puerto Rico and lived there until he was age 18, should be deemed to have satisfied the requirement in Section 1401(a)(7) that he lived in the United States (or an outlying possession of the United States) for five years *after* his 14th birthday. Respondent concedes (Br. in Opp. 27) that his father left Puerto Rico for the Dominican Republic 20 days before he might have satisfied that requirement on his nineteenth birthday. But respondent argues (*ibid.*) that courts should fashion a "grace period[]" exception to the clear rule set forth in Section 1401(a)(7) because *other* immigration laws explicitly incorporate such grace periods. Respondent's grace-period argument answers itself: Congress plainly knew how to create a grace period and did not do so in Section 1401(a)(7).

Respondent also argues (Br. in Opp. 28-30) that the Dominican Republic was an outlying possession of the

United States in 1919 (when respondent's father arrived there from Puerto Rico) because the United States had a military presence in the country, and that his father's presence there should count toward the period required by Section 1401(a)(7). Respondent acknowledges that the relevant statutory scheme defined "outlying possessions" to include "American Samoa, Swains Island and 'any other territory which was, in fact and law, an outlying possession of the United States during the period of the citizen parent's physical presence therein.'" *Id.* at 29 (quoting *In re V—*, 9 I. & N. Dec. 558, 561 (B.I.A. 1962)). And respondent does not identify any source that would establish the Dominican Republic's status "in law" as an outlying possession of the United States. The court of appeals correctly rejected respondent's statutory arguments.

Second, the existence of alternative statutory arguments in favor of respondent's position does not diminish the importance of the questions presented or alleviate the difficulties created by the circuit split. If this Court were to conclude that the Second Circuit erred in reaching the constitutional question because it should have ruled in respondent's favor on statutory grounds, such a ruling would have the effect of vacating the court of appeals' decision declaring an Act of Congress unconstitutional and would eliminate the circuit conflict.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*

JUNE 2016

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No. 15-1191

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
*Petitioner,*

—v.—

LUIS RAMON MORALES-SANTANA,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, THE NATIONAL IMMIGRATION LAW CENTER, AND THE NATIONAL WOMEN'S LAW CENTER, IN SUPPORT OF RESPONDENT

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## STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. The ACLU has appeared before this Court in numerous equal protection cases as both direct counsel and *amicus curiae*, including *Miller v. Albright*, 523 U.S. 420 (1998), *Nguyen v. INS*, 533 U.S. 53 (2001), and *Flores-Villar v. United States*, 564 U.S. 210 (2011). Through its Women's Rights Project, the ACLU has litigated many cases challenging gender-based classifications on constitutional grounds. The ACLU's Immigrants' Rights Project engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants. The New York Civil Liberties Union is the New York state affiliate of the ACLU.

The National Immigration Law Center (NILC) is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce the values of equality, opportunity,

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[1] The parties have consented to the filing of *amicus* briefs by submitting blanket letters of consent to the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members or its counsel made a monetary contribution to this preparation or submission of this brief.

and justice. This work has included litigation seeking to protect access to status for immigrants, and to ensure all individuals, regardless of immigration status, are provided equal protection under the law.

The National Women's Law Center (NWLC) is a non-profit legal organization that has worked since 1972 to advance and protect legal rights and opportunities for women, at school, at work, at home, and in their communities. NWLC focuses on major areas of importance to women and their families, including income security, workplace justice, education, and reproductive rights and health, with special attention to the needs of low-income women and women of color. NWLC has participated as counsel or amicus curiae in a range of cases before this Court to secure the equal treatment of women under the law and has a strong interest in ensuring that all persons receive equal protection under the Constitution and in protecting mothers, fathers, and children from the harm gender-stereotyped laws can inflict.

## STATEMENT OF THE CASE

Respondent Luis Ramon Morales-Santana was born in the Dominican Republic in 1962. Pet. App. 6a. His father, a U.S. citizen, later married Morales-Santana's mother, a citizen of the Dominican Republic, and they moved to the United States. Morales-Santana has lived in the U.S. for more than forty years.

At the time of Morales-Santana's birth, the following provisions governing statutory birthright citizenship were in force:

8 U.S.C. § 1401(a)(7) (1958) (emphasis added)

(a) The following shall be nationals and citizens of the United States at birth:

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, *at least five of which were after attaining the age of fourteen years* . . .

8 U.S.C. § 1409 (1958) (emphasis added)

Children born out of wedlock.

(a) The provisions of paragraphs ... (7) of section 1401(a) of this title . . . shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation. . .

(c) Notwithstanding the provision of subsection (a) of this section, a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously

> been physically present in the United States or one of its outlying possessions *for a continuous period of one year.*

The statute thus imposed disparate requirements on U.S. citizen fathers and mothers for the transmission of citizenship to children born out of wedlock. A mother was required to have been present in the U.S. for a period of only one year, any time before the child's birth, in order to transmit citizenship. 8 U.S.C. § 1409(c) (1958). In contrast, a father must have legitimated the child while he or she was under the age of 21 and must have resided in the U.S. for a period of ten years before the child's birth, at least five of which were after the father was 14 years old. 8 U.S.C. §§ 1401(a)(7), 1409(a) (1958). A gender-based difference in residency requirements continues in the current version of the statute.[2]

Morales-Santana's father legitimated his son when he was eight years old by marrying his mother and resided in the U.S. for more than ten years prior to Morales-Santana's birth. However, he could not meet the five-year prong of the residency requirement because he left the U.S. when he was 18

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[2] These provisions were amended in 1986. Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3657 (1986). Because Morales-Santana was born before the amendments, the former 8 U.S.C. §§ 1401(a)(7) and 1409 are applicable.

Under the current version of the statute, fathers of children born out of wedlock must have five years of total residency, with at least two years occurring after the age of 14 years old, in order to transmit citizenship. 8 U.S.C. §§ 1401(g), 1409(a). Mothers must have one continuous year of residency prior to the child's birth. 8 U.S.C. § 1409(c).

years old – 20 days shy of his 19th birthday and of reaching five years of residence after the age of 14 years old – returning after Morales-Santana's birth. Pet. App. 6a.

After he was placed in removal proceedings in 2000, Morales-Santana asserted his status as a U.S. citizen. The Board of Immigration Appeals rejected his argument, concluding that he could not satisfy the residency requirements laid out in the law. Pet. App. 8a.

Morales-Santana challenged the gender-based residency requirements on equal protection grounds. The U.S. Court of Appeals for the Second Circuit concluded that the statute was subject to, but failed, heightened scrutiny. Pet. App. 15a-25a. The Second Circuit determined that the governmental interest in ensuring a sufficient tie between the child and the United States was not advanced by subjecting mothers and fathers to different residency requirements. Pet. App. 21a-25a. The court of appeals also found that avoiding statelessness of children was neither the actual purpose for relaxing the residency requirement for mothers nor substantially related to gender-based residency distinctions. Pet. App. 25a-34a. Lastly, it ruled that the appropriate remedy was to permit fathers to transmit citizenship subject to the same one-year residency requirement as mothers of non-marital children. Pet. App. 35a-41a.

## SUMMARY OF ARGUMENT

At issue in this case are gender-based residency requirements that make it more difficult, or in some cases create an absolute bar, for fathers to transmit U.S. citizenship to their children, and that blocked Morales-Santana's citizenship claims in this case. If his mother had been a U.S. citizen with the same history of residency in the United States as his father, Morales-Santana would be a citizen today. But despite having legitimated his son, Morales-Santana's father could not transmit citizenship because he fell just weeks short of meeting the much more onerous residency requirement for fathers. Moreover, the law prohibits all fathers under the age of 19 years old from transmitting citizenship to their children.

*Amici* submit this brief to address two points. First, the Court should apply heightened scrutiny, as it ordinarily does in gender discrimination cases, and should reject the government's request for a more deferential standard of review based on the plenary power doctrine. Second, like the Court of Appeals, this Court should conclude that the government has not presented an exceedingly persuasive justification for differentiating between fathers and mothers in imposing residency requirements.[3]

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[3] The government also argues that the Court of Appeals exceeded its authority in concluding that the one-year residency requirement for mothers should be extended to fathers of non-marital children. We agree with Morales-Santana on this point, but do not separately address it in this brief.

1. Under this Court's precedents, former 8 U.S.C. §§ 1401(a)(7) and 1409 are subject to heightened scrutiny because they facially discriminate on the basis of gender.[4] The government contends, however, that heightened scrutiny is the wrong standard because this case involves Congress's plenary power over immigration and the Court should therefore apply a more deferential standard, as the Court has done in immigration cases such as *Fiallo v. Bell*, 430 U.S. 787 (1977). U.S. Br. at 12. But here, the issue is birthright citizenship, not Congress's traditional immigration or naturalization powers. *Amici* are not aware of any case in which the Court has applied the plenary power doctrine in a case involving birthright citizenship.

Even assuming, however, that the Court were to view birthright citizenship as falling within the scope of Congress's immigration powers, the Court should nonetheless apply heightened scrutiny, and not the deferential standard of review applied in *Fiallo*. Since *Fiallo*, the Court has rejected attempts to shield congressional action on immigration matters from meaningful judicial scrutiny. *See Zadvydas v. Davis*, 533 U.S. 678 (2001) (detention). More particularly, since *Fiallo* was decided, this Court has made unequivocally clear, in numerous cases, that heightened scrutiny should be applied whenever laws explicitly discriminate on the basis of

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[4] Although the issue is not before the Court, *amici* note that heightened scrutiny would also apply to any review of the current residency requirements, which reduce but do not eliminate the gender disparity. *See* n.2, *supra*.

gender. Consequently, in immigration cases involving discrimination on the basis of gender, the Court should apply heightened scrutiny. Whether the plenary power doctrine should be discarded altogether in light of modern developments is not an issue that need be addressed, as this case unquestionably involves an explicit gender-based classification.

2. Once former 8 U.S.C. §§ 1401(a)(7) and 1409 are analyzed under this Court's precedents on heightened scrutiny, it is clear they fail to meet that demanding standard. The government has not established exceedingly persuasive justifications for the gender classification, one of the few that persist in federal law. The gender classification is not substantially related to important governmental interests today, and neither of the interests asserted by the government motivated the enactment of the statute. Because the law creates an insurmountable hurdle to citizenship transmission for some fathers and gender-neutral alternatives exist, it cannot be rationalized as a beneficent allowance to U.S. citizen mothers.

## ARGUMENT

### I. HEIGHTENED SCRUTINY IS THE PROPER STANDARD OF EQUAL PROTECTION REVIEW.

The Court of Appeals correctly concluded that Congress's plenary power over immigration matters does not justify reducing the level of equal protection scrutiny applicable here. Pet. App. 16a-20a. Statutory citizenship at birth is not an immigration

or naturalization matter, and this Court has never applied the plenary power doctrine to birthright citizenship laws. Because immigration is not at issue here, the Court need not decide whether Congress's plenary power over immigration and naturalization would otherwise alter the level of scrutiny. But, even if birthright citizenship were deemed to be within the scope of Congress's plenary immigration power, the Court should nonetheless hold, consistent with its post-*Fiallo* precedents, that heightened scrutiny applies where Congress explicitly legislates on the basis of gender.

### A. The Court Need Not Decide Whether The Plenary Power Doctrine Limits The Level Of Equal Protection Scrutiny Because This Case Involves Birthright Citizenship.

#### 1. Statutory Citizenship At Birth Does Not Involve Immigration Or Naturalization.

Congress's conferral of citizenship at birth to children born abroad to citizen parents is fundamentally distinct from the regulation of immigration. At its core, the immigration power pertains to Congress's authority to exclude persons for whom it recognizes no present claim to citizenship, or even entry. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("We are dealing here with an exercise of the Nation's sovereign power to admit or exclude foreigners . . . ."); *Nguyen v. INS*, 533 U.S. 53, 96 (2001) (O'Connor, J., dissenting) ("The instant case is not about the admission of

aliens but instead concerns the logically prior question whether an individual is a citizen in the first place."); *Miller*, 523 U.S. at 480 (Breyer, J., dissenting) ("The Court has applied a deferential standard of review in cases involving aliens, not in cases in which only citizens' rights were at issue.").

In contrast, this case concerns the right of a U.S. citizen to transmit his citizenship to his citizen or putative citizen child. It is beyond dispute that citizenship is an important and unique right. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963) (recognizing that the right of citizenship is "a most precious right"); *see also Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. . . . [The] citizenry is the country and the country is its citizenry."). While Congress may generally restrict the conferral of *jus sanguinis* citizenship by statute, Congress's determinations must satisfy constitutional standards, including equal protection.[5]

Similarly, although citizenship through naturalization rests upon proven ties to the country, it is legally distinct from statutory citizenship at birth. Naturalization involves acquisition of a new status that begins only when naturalization is

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[5] Even where the government acts through statute to grant rights that it is under no constitutional mandate to grant, it may not do so in a discriminatory manner. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 85 (1979) (prohibiting discriminatory distribution of Aid to Families With Dependent Children even though benefits granted by statute).

complete. *See* 8 U.S.C. § 1101(a)(23) ("The term 'naturalization' means the conferring of nationality of a state upon a person *after* birth, by any means whatsoever.") (emphasis added).

Statutory citizenship at birth constitutes recognition of a status created at the time of the child's birth by virtue of the child's parentage. If the conditions for statutory citizenship at birth are met, that existing status is recognized. *See* 8 U.S.C. § 1409(a) (acknowledging citizenship "as of the date of birth"); *see also Miller*, 523 U.S. at 432 (Stevens, J.) (explaining that a judgment in Miller's favor would "confirm [the petitioner's] pre-existing citizenship rather than grant her rights that she does not now possess").[6]

Statutory citizenship at birth thus does "not involve the transfer of loyalties that underlies the naturalization of aliens." *Miller*, 523 U.S. at 478 (Breyer, J., dissenting); *see also id.* at 481 ("[T]he statutes that automatically transfer American citizenship from parent to child 'at birth' differ significantly from those that confer citizenship on

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[6] The Immigration and Nationality Act contains several categories of citizens at birth, including some categories not based on any relationship to a citizen parent. In addition to the type of citizenship at issue here, the categories of birthright citizenship include persons born in the United States to a member of an American Indian or other native tribe (8 U.S.C. § 1401(b)), children of unknown parentage found in the U.S. (8 U.S.C. § 1401(f)), persons born in Puerto Rico (8 U.S.C. § 1402), and persons with an American parent born in the Panama Canal Zone (8 U.S.C. § 1403), as well as persons born in the U.S. who are subject to U.S. jurisdiction (8 U.S.C. § 1401(a)).

those who originally owed loyalty to a different nation.").

### 2. The Court Has Never Extended The Plenary Power Doctrine To Citizenship At Birth.

As the Court of Appeals noted, Pet. App. 18a, this Court has never exempted birthright citizenship determinations from ordinary constitutional analysis, much less held that heightened scrutiny would not apply if such determinations were based on explicit gender classifications. *See Miller*, 523 U.S. at 480 (Breyer, J., dissenting) ("The Court to my knowledge has never said, or held, or reasoned that statutes automatically conferring citizenship 'at birth' upon the American child of American parents receive a more lenient standard of review."); *see also Nguyen*, 533 U.S. at 97 (O'Connor, J., dissenting) ("Because §§ 1401 and 1409 govern the conferral of citizenship at birth, and not the admission of aliens, the ordinary standards of equal protection review apply.").

In *Rogers v. Bellei*, 401 U.S. 815 (1971), for example, the Court scrutinized a statute governing citizenship at birth under ordinary constitutional standards. In that case, the foreign-born plaintiff child of a U.S. citizen mother challenged the five-year residency requirement then imposed on such children who wished to claim statutory citizenship at birth. In upholding the residency requirements, the Court did not treat the plaintiff as an alien without standing to raise such constitutional arguments, nor did it lower the standard of review based on the plenary power doctrine. Rather, the

Court acknowledged that Bellei was a citizen for purposes of his claim until such time as the Court determined that he had failed to meet any conditions lawfully placed on his citizenship by Congress. *See id.* at 827 (noting plaintiff's claim to "continuing" citizenship). *Accord Nguyen*, 533 U.S. at 96-97 (O'Connor, J., dissenting) ("A predicate for application of the deference commanded by *Fiallo* is that the individuals concerned be aliens. But whether that predicate obtains is the very matter at issue in this case."); *see also Miller*, 523 U.S. at 433 n.10 (Stevens, J.).

Nor did the Court in *Bellei* simply defer to Congress's judgment as to what conditions to place on statutory citizenship at birth. Instead, the Court satisfied itself that the congressional scheme reflected "careful consideration," and was "purposeful and not accidental." 401 U.S. at 833. In the absence of a classification requiring heightened review (the statute there was gender-neutral), the Court exercised rational basis review, holding that while the residency requirement "may not be the best that could be devised . . . we cannot say that it is irrational or arbitrary or unfair." *Id.* Critically, the Court did not apply a more deferential standard of review pursuant to the plenary power doctrine. *See Miller*, 523 U.S. at 480-81 (Breyer, J., dissenting) (explaining that in *Bellei*, "[w]hen the Court [] considered a case "in which only citizens' rights were at issue," the Court did "not lower[] the standard of review") (citing *Bellei*, 401 U.S. at 828-36).

The government nonetheless asserts that the gender-based classifications at issue here are subject to a deferential standard of review in light of

Congress' plenary power in the immigration area, relying on *Fiallo*. U.S. Br. at 17. Yet unlike this case, *Fiallo* did not involve a citizenship claim, much less a birthright citizenship claim.

In *Fiallo*, three sets of unwed natural fathers and their children each sought a special immigration preference by virtue of a relationship to a citizen or resident alien child or parent. Rather than employ full-fledged constitutional scrutiny, this Court deferred to Congress's plenary power in setting immigration policy, examining only whether the challenged statute was based on a "facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794. The Court indicated, however, that such deference would not extend beyond immigration, since "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* at 792 (quoting *Mathews v. Diaz*, 426 U.S. 67, 78 (1976)).[7]

Thus, because *Fiallo* involved immigration benefits, it does not resolve the appropriate level of equal protection scrutiny where Congress draws explicit gender-based lines in the context of birthright citizenship. *See, e.g.*, *Miller*, 523 U.S. at 429 (Stevens, J.) (*Fiallo* "involved the claims of several aliens to a special immigration preference,

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[7] Although two of the petitioners in *Fiallo* were U.S. citizens, those citizens sought immigration benefits on behalf of relatives who were aliens, and the case therefore implicated the considerations that underlie the plenary power doctrine. In contrast, here, where citizenship at birth is the sole issue, such deference is not appropriate.

whereas here petitioner claims that she is, and for years has been, an American citizen."); *see also id.* at 432-33 (distinguishing *Fiallo*); *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting) ("*Fiallo* . . . is readily distinguished. *Fiallo* involved constitutional challenges to various statutory distinctions, including a classification based on the sex of a United States citizen or lawful permanent resident, that determined the availability of a special immigration preference to certain aliens by virtue of their relationship with the citizen or lawful permanent resident.").

Congress's decisions regarding the identity of our citizenry must not be permitted to be infected with discrimination that is tolerated neither by our legal system nor our society in other contexts. As Justice Breyer cautioned in *Miller*, applying a "specially lenient" standard to statutory citizenship at birth would mean that such statutes "could discriminate virtually free of independent judicial review." 523 U.S. at 478 (Breyer, J., dissenting). *Cf. Trop v. Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion) (holding that a statute stripping military deserters of U.S. citizenship was unconstitutional, and observing that "[w]hen it appears that an Act of Congress conflicts with [a constitutional] provision[], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less.").

For centuries, Congress has recognized that birth to a United States citizen is a sufficiently strong tie to this country to make a child eligible for citizenship at birth. Because this case involves birthright citizenship, heightened scrutiny is the

appropriate standard of review. Accordingly, the Court "need not decide" whether the plenary power doctrine would otherwise dictate a more deferential standard of review if this were a traditional immigration or naturalization case. *Miller*, 523 U.S. at 429 (Stevens, J.).

### B. Heightened Scrutiny Is The Proper Standard Even If The Court Were To View Birthright Citizenship As A Traditional Immigration And Naturalization Issue.

Even if the Court were to conclude that birthright citizenship is an immigration and naturalization issue, heightened scrutiny is nonetheless the applicable standard. As an initial matter, the Court's recent immigration precedents have taken a more measured approach to the plenary power doctrine than suggested by the government in this case. Indeed, since *Fiallo*, the Court has been increasingly reluctant to insulate immigration legislation from searching constitutional scrutiny. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32-35, 37 (1982) (holding that exclusion procedures for lawful permanent residents returning from brief trips abroad must comply with due process); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) (invalidating a provision authorizing one house of Congress to veto a decision by the Executive to grant relief from deportation, stating that although "[t]he plenary authority of Congress over aliens . . . is not open to question," the Court must inquire into "whether Congress has chosen a constitutionally permissible means of implementing that power"); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (rejecting

government's argument that the plenary power doctrine justified an expansive construction of statute authorizing immigration detention, emphasizing that a "statute permitting indefinite detention of an alien would raise a serious constitutional problem"); *INS v. St. Cyr*, 533 U.S. 289, 304 (2001) (construing provision of immigration statute to avoid Suspension Clause concerns); *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that statute applicable to noncitizens detained at Guantánamo was unconstitutional, stating that "[i]f the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause").

The Court's recent measured approach to the plenary power doctrine is appropriate given the extraordinary nature of the doctrine. But the Court need not decide in this case whether the plenary power doctrine should generally be discarded or tempered in all immigration contexts, because this case involves discrimination on the basis of gender. At least in such cases, the Court ought to apply ordinary constitutional standards of review, and reject the outdated *Fiallo* approach.

Rejecting the *Fiallo* approach in this case is especially appropriate in light of this Court's post-*Fiallo* gender precedents. Indeed, it was after *Fiallo* was decided that this Court issued its "pathmarking decisions" instructing that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States v. Virginia*, 518 U.S. 515, 531 (1996) (citation omitted). Both *Virginia* and

the decisions it cited, *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), were handed down after *Fiallo*.

In particular, *J.E.B.* emphasized in categorical terms that "[the] long and unfortunate history of sex discrimination" in this country "warrants the heightened scrutiny we afford *all* gender-based classifications today." 511 U.S. at 136 (emphasis added). And since that time, the Court has continued to make clear that heightened scrutiny is the proper standard whenever laws are drawn in explicitly gender-based terms. *See, e.g., Virginia*, 518 U.S. at 555; *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003).

To allow gender discrimination to exist in one area of the law damages the entire fabric of the Court's equal protection jurisprudence and perpetuates the harms that jurisprudence seeks to eliminate. *See, e.g., Nguyen*, 533 U.S. at 83 (O'Connor, J., dissenting). It also sounds a powerfully negative message that the Nation's highest institutions do not truly believe that unequal treatment on the basis of gender is *always* intolerable. *Id.* at 74.

In sum, the Court should reject the government's request for deferential review and should apply heightened scrutiny because this case involves birthright citizenship laws that are based on explicit gender classifications. Indeed, the logical consequence of the government's argument is that the plenary power doctrine would not only dictate a deferential standard of review in gender cases, but

also where Congress enacted legislation based on the most rank racial stereotypes. At this stage in the country's history, the Court should not endorse the government's position.

## II. THE GENDER-BASED RESIDENCY REQUIREMENTS DO NOT SURVIVE HEIGHTENED SCRUTINY.

Once heightened scrutiny is applied, it is clear that the disparate residency requirements in § 1409 cannot survive constitutional challenge. The court of appeals correctly concluded that the purposes proffered by the government fall far short of justifying the discriminatory treatment of fathers. To hold otherwise would undermine the equal protection standard that this Court has enforced for decades.

The framework for analyzing gender-based equal protection challenges under heightened scrutiny is well-established. An "exceedingly persuasive justification . . . must be the solid base for any gender-defined classification." *Virginia*, 518 U.S. at 546. "The State must show at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* at 533. The state's burden is "demanding," and the justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.*

Gender classifications warrant heightened scrutiny because "the sex characteristic frequently bears no relation to ability to perform." *Frontiero v.*

*Richardson*, 411 U.S. 636, 686 (1973) (plurality opinion). Too often, classifications based on sex are rooted in "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. Thus, an equal protection violation can occur even when empirical evidence might suggest that there is some correlation between gender and the trait for which it is serving as a proxy. *J.E.B.*, 511 U.S. at 139 n.11; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Craig v. Boren*, 429 U.S. 190, 202 (1976); *Frontiero*, 411 U.S. at 688-89 (plurality opinion). To tolerate a gender-based classification unsupported by an exceedingly persuasive justification would violate a core constitutional principle: "At the heart of the constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring).

The government argues that the sex-based residency requirements represent a tailored response to ensuring a sufficiently strong connection between a child born abroad and the United States. According to the government, because other countries and the U.S. typically treated mothers as the only "legal parent" at birth for children born outside of marriage, mothers were not similarly situated to fathers and thus can enjoy a lower residency requirement. The government also contends that the residency requirements furthered an interest in reducing the risk of statelessness faced by non-marital children born abroad to U.S. citizen mothers. This Court's equal protection jurisprudence,

however, demonstrates that the government has not met its burden.

*First*, the government completely fails to demonstrate the disparate residency requirements are substantially related to an important state interest *today*. Shifting gender roles and legal regimes can undermine the relationship that may have once existed between a classification and a state interest. "[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015); *see also United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

For this reason, the Court frequently has emphasized that heightened scrutiny is intended to root out sex classifications based on "archaic" justifications out of line with "contemporary reality." *Califano v. Goldfarb*, 430 U.S. 199, 206 (1977); *see, e.g.*, *J.E.B.*, 511 U.S. at 135 (heightened scrutiny recognizes the danger of gender classifications based on "archaic" generalizations); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985) (gender classifications generally based on "outmoded" rationales); *Craig*, 429 U.S. at 198-99 (striking down gender classification when rationale was "outdated"). A law should not survive constitutional scrutiny solely because it accurately described a world of more than six decades ago.

The government does not attempt to show that its justifications for the gender-based distinctions in

the statute remain salient today, even as the law continues to impose a longer residency requirement on fathers. *See, e.g.*, U.S. Br. at 10 (analyzing the government interests in the statute in 1940 and 1952). Its analysis rests on assertions about parenthood, statelessness, and nationality laws that discriminated based on gender existing around the world in 1940 and 1952, the years the provisions at issue were first adopted and amended.

The equal protection doctrine demands more. The most plausible explanation for the disparate residency requirements is that Congress was legislating based on stereotypical assumptions regarding maternal responsibility and paternal irresponsibility for children born outside of marriage, as well as furthering racially nativist immigration policies. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2199-2206, 2230-33 (2014). Just as this Court's jurisprudence has acknowledged changed understandings of marriage, *see Obergefell*, 135 S. Ct. at 2596, changed understandings of parenthood and the bonds between fathers and children must be addressed.

Fathers' roles in the lives of their children have transformed dramatically over the last sixty years. In 2015, fathers made up 16 percent of single parents with minor children in the United States. United States Census Bureau, Current Population Survey (CPS), America's Families and Living Arrangements: 2015: Family Groups, FG6 and FG10, http://www.census.gov/hhes/families/data/cps2015FG.html. From 1950 to 2007, the number of

households with children headed by fathers with no spouse present increased fivefold. U.S. Census Bureau, America's Families and Living Arrangements: 2007 2 (2009), http://www.census.gov/prod/2009pubs/p20-561.pdf. The number of fathers who care for their children and do not work outside the home has doubled since 1989, now reaching two million. Gretchen Livingston, Pew Research Center, Growing Numbers of Dads Home with the Kids: Biggest Increase Among Those Caring for Family 5 (2014), http://www.pewsocialtrends.org/2014/06/05/growing-number-of-dads-home-with-the-kids/. In 2015, nearly 1.5 million paternities were established and acknowledged for children born to unmarried parents in the United States. Office of Child Support Enforcement, FY 2015 Preliminary Report 8 (Apr. 2016), http://www.acf.hhs.gov/sites/default/files/programs/css/fy2015_preliminary.pdf.

Moreover, there is no doubt that nationality laws around the world have undergone major reforms since the enactment and amendment of the statute. Many countries today grant equality to men and women with regard to the nationality of their children. United Nations High Commissioner for Refugees, Background Note on Gender Equality, Nationality Laws and Statelessness 1-3 (2016), http://www.refworld.org/docid/56de83ca4.html (hereinafter UNHCR). It would turn the equal protection doctrine on its head for this Court to uphold a gender classification based on governmental justifications that depend on the discriminatory nature of other countries' laws, when many of those countries no longer discriminate based on gender.

*Second*, a decision upholding the disparate residency requirements cannot be reconciled with *Nguyen v. INS*, 533 U.S. 53 (2001), in which the Court upheld the statute's legitimation requirement for fathers. Central to the holding was that the statute furthered the "facilitation of a relationship between parent and child." *Id.* at 68. Yet, the disparate residency requirements have the opposite effect, by making it more difficult for fathers to transmit citizenship to children they legitimate. Moreover, they create a disincentive for fathers to legitimate their children. As the government itself has conceded, many children become stateless because they are born in countries where acknowledgement or legitimation by the father deprives the child of acquiring the citizenship of his mother. *See* U.S. Br. at 37-38; U.S. Br., *Nguyen v. INS*, 2000 WL 1868100 *17, *18 n.9 (5th Cir. 2000) (No. 99-2071). Thus, U.S. citizen fathers who choose to facilitate relationships with their children through legitimation then risk rendering them stateless. Heightened scrutiny demands that the government explain how a gender classification can be substantially related to its interests when the classification also undermines interests previously advanced to, and accepted by, this Court.

Moreover, the residency requirements for transmitting citizenship pose the sort of absolute bar that *Nguyen* called into question. Specifically, the *Nguyen* Court emphasized that the legitimation requirements at issue were not "inordinate and unnecessary hurdles" and "can be satisfied on the day of birth, or the next day, or the next 18 years" by the father through pre-existing legal procedures. 533

U.S. at 70-71. That is not true with respect to the residency requirements. For fathers who are 18 years old or younger, such as the petitioner in *Flores-Villar*, it is "physically impossible" to have the required physical presence because they became parents when less than 19 years old and could not acquire five years of residency after the age of 14 years old. *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008), *aff'd*, 564 U.S. 210 (2011).

The distinction between procedural barriers and absolute bars has constitutional significance, as this Court has recognized in other gender discrimination cases. *See Califano v. Westcott*, 443 U.S. 76, 85 (1979). *See also Virginia*, 518 U.S. at 546 (state's goal of producing citizen-soldiers "is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit"). The complete and unexplained exclusion of fathers under the age of 19 years underscores the inadequacy of the justifications put forth by the government. *See Goldfarb*, 430 U.S. at 215 (noting that Congress had not given any attention to the specific case of nondependent widows and their need of benefits when striking down a federal law that granted benefits to all widows but only to dependent widowers).

*Third*, the government impermissibly relies on the contention that "when a child is born out of wedlock, there ordinarily is only one legally recognized parent – the mother – at the time of birth." U.S. Br. at 5. It draws on this assumption to argue that mothers and fathers of non-marital children are not similarly situated and thus different

residency criteria can be imposed upon them to establish connection to the U.S.

The government's emphasis on the legal status of mothers versus fathers at the moment of birth turns a blind eye to the many fathers who have legal relationships with their non-marital children at or soon after birth, by acknowledging paternity, supporting the child, marrying the mother, or through other legal means. *See, e.g.*, United States Children's Bureau, Child Welfare Info. Gateway, The Rights of Unmarried Fathers 1 (2014), http://www.childwelfare.gov/pubPDFs/putative.pdf. Ignoring this reality would authorize the government to discriminate against fathers of non-marital children in every circumstance, an outcome that this Court's decisions do not allow. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 389-94 (1979); *Stanley v. Illinois*, 405 U.S. 645, 649-58 (1972). It also reinforces prevailing stereotypes that unmarried fathers lack responsibility for their children by assuming that the legal relationship between them does not change after birth. There is no distinction for purposes of determining a child's connection to the U.S. between a family with a U.S. citizen mother and non-citizen father who legitimates the child soon after birth and a family with a non-citizen mother and U.S. citizen father who legitimates soon after birth.

In addition, the seemingly gender-neutral concept of "legal parent" does not insulate the government's rationale from scrutiny. The government's definition of legal parent focuses only on parents at birth, which it then posits as "ordinarily" mothers. It is unclear why, in the

government's view, the moment of birth is decisive, especially when fathers might sometimes be the only legal parent. *See* Resp't. Br. at 35. Moreover, the federal government imposed stricter requirements for what constituted legitimation by a father for a non-marital child under the 1952 Act than did many states and foreign countries. *See* Br. Amici Curiae of Professors of History, Political Science, and Law In Support of Petitioner; Collins, 123 Yale L.J. at 2198 n.256. It mandated marriage to the mother, which was frequently impossible if the mother refused, was no longer alive, or for a host of other reasons. *Id.* In doing so, the federal government of that time constructed legal parenthood according to its own assumptions about how fathers should, or should not, relate to their non-marital children.

The Court previously has noted that justifying a gender classification based on the "legal" status of a father can itself reflect biased decision-making by the government. Striking down a state law that placed a non-marital child in state custody upon the death of the mother, the Court observed that the state's refusal to recognize an unmarried father as a parent denigrated the familial bond between father and child. "'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.'" *Stanley*, 405 U.S. at 652 (quoting *Giona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75-76 (1968)). *See also Trimble v. Gordon*, 430 U.S. 762, 772-73 (1977). Here, the government draws the line at parenthood at the moment of birth. In doing so, it

"needlessly risks running roughshod over the important interests of both parent and child" by disregarding the actual nature of the connections between fathers, children, and the United States. *Stanley*, 405 U.S. at 657. In combination with the strict requirement of marriage in order to legitimate, the residency requirements erected an impossible barrier for many fathers to transmit citizenship, even when they had close relationships with their children.

*Fourth*, the government has not established that statelessness justifies or was intended by Congress to justify the disparate residency requirements. The problem of statelessness is not confined to the non-marital children of U.S. citizen mothers. It exists for the non-marital children of U.S. citizen fathers as well. Many non-marital children of U.S. citizen fathers were and are at risk of statelessness because they are born in countries that recognize the paternal transmission of statutory birthright citizenship. *See* Brief of Amici Curiae Scholars on Statelessness in Support of Petitioner, *Flores-Villar v. United States*, 2010 WL 2569160, at *10 (June 24, 2010); UNHCR, *supra* at 3-4 (identifying laws of the father's country that do not permit him to confer nationality in certain circumstances, such as when the child is born abroad, as increasing the risk of statelessness); Equal Rights Trust, My Children's Future: Ending Gender Discrimination in Nationality Laws III, 1, 22-23 (2015) http://www.equalrightstrust.org/ertdocumentbank/My%20Children%27s%20Future%20Ending%20Gender%20Discrimination%20in%20Nationality%20Laws.pdf. Many other children become

stateless because they are born in countries where acknowledgement or legitimation by the father deprives the child of acquiring the citizenship of his mother, as the government has recognized on other occasions. *See* U.S. Br., *Nguyen v. INS*, 2000 WL 1868100 *17, *18 n.9 (5th Cir. 2000) (No. 99-2071); UNHCR, *supra* at 3.

Under heightened scrutiny, the government faces a heavy burden of showing why a problem faced by both men and women should be addressed by a statute that differentiates based on gender. Yet, the government did not attempt to do so – for example, by showing how many non-marital children at risk of statelessness with one U.S. citizen parent are children of U.S. citizen mothers, or the extent to which being born abroad out of wedlock to a U.S. citizen mother correlates with statelessness generally.

Furthermore, the government's assertion that Congress adopted the disparate residency requirements in § 1409 as a considered response to the problem of statelessness is not supported by the legislative history. The provisions governing the transmission of citizenship to children born out of wedlock were first adopted in 1940. The legislative hearings that led to passage of the 1940 Act are silent on the risk of statelessness facing the non-marital children of U.S. citizen fathers. Pet. App. 26a-32a. In other words, there is no support for the conclusion that Congress recognized a unique problem faced by the non-marital children of U.S. citizen mothers, but not fathers, and drafted the different residency requirements in response.

Moreover, if Congress was concerned about the problem of children's statelessness, the 1940 Act was a strange response because it exacerbated the risk of statelessness for non-marital children born abroad to U.S. citizen fathers. For U.S. citizen mothers, the rules matched prior State Department policy: the non-marital child of a U.S. citizen mother was entitled to U.S. citizenship if the mother had resided in the U.S. for any period of time prior to the child's birth. Collins, 123 Yale L.J. at 2199-2200.[8] As a result of the 1940 Act, however, a U.S. citizen father under the same circumstances was required to show that he had resided in the U.S. for a total of ten years, five of which were after the age of 16 years old.[9]

The government seeks to explain the disparate residency requirements adopted in 1940 by pointing to a passage from the Senate Report accompanying the 1952 Act, but its reliance is misplaced. U.S. Br. at 38. The 1952 Act made various changes to the provisions governing birthright citizenship, and the Senate Report explained one of those changes by

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[8] Furthermore, non-marital children of U.S. citizen mothers and fathers faced differential residency requirements to *retain* their citizenship. While children of U.S. citizen mothers absolutely acquired citizenship at birth, children of U.S. citizen fathers were required to reside in the U.S. for a period of five years between the ages of 13 and 21 years old or lose their citizenship. Nationality Act of 1940, ch. 876, §§ 201(g), 205, 54 Stat. 1139 (1940) (repealed 1952).

[9] The age after which the five years of residency must occur was changed from 16 years old to 14 years old by the Immigration and Nationality Act, ch. 477, Title III, ch. 1, § 301(a)(7), 66 Stat. 236 (1952).

stating: "This provision establishing the child's nationality as that of the mother regardless of the legitimation or establishment of paternity is new. It insures that the child shall have a nationality at birth." S. Rep. 1137, 82d Cong., 2d Sess. 39 (1952). This statement, however, did not address the disparate residency requirements at issue here. Rather, it referred to the deletion of a provision that allowed mothers to transmit citizenship only when legitimation by the father had not occurred. The Report recognized that this non-legitimation condition had created uncertainty for children because legitimation remained a possibility until the child reached the age of majority. By eliminating that contingency, Congress ensured that children could acquire a nationality through their mothers at birth, rather than being forced to wait to discover whether or not they were U.S. citizens. This change also advanced the prevailing understanding at the time that mothers would naturally be the caretakers of their non-marital children. Because the Report language was not even trying to justify the disparate residency requirements, it certainly does not meet the government's burden of justification under heightened scrutiny.

*Fifth*, even assuming that the disparate residency requirements were adopted as a benign benefit for U.S. citizen mothers whose non-marital children were born abroad, section 1409 is an unconstitutional means of accomplishing that goal because it unfairly and unnecessarily disadvantages the similarly situated children of U.S. citizen fathers. This Court's precedents establish that "[s]ex classifications may be used to compensate women for

particular economic disabilities they have suffered, to promote equal employment opportunity, or to advance full development of the talent and capacities of our Nation's people." *Virginia*, 518 U.S. at 533 (citations omitted). But they cannot be used "for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes." *Wiesenfeld*, 420 U.S. at 648.[10]

*Sixth*, the government fails to adequately address the existence of gender-neutral alternatives,

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[10] Furthermore, the disparate residency requirements that apply to fathers and mothers of non-marital children under § 1409 cannot be justified on the ground that fathers of non-marital children are subject to the same residency requirements as parents of marital children. The equivalency is incomplete and misleading. For married parents, the citizen mother or father simply needs to establish that she or he meets the residency requirement in order to transmit citizenship, 8 U.S.C. § 1401(a)(7) (1970). But citizen fathers of non-marital children must meet multiple statutory hurdles – legitimation as defined by the federal government as well as the residency requirement at issue here – that act together to prevent some fathers from transmitting citizenship regardless of their best efforts, render non-marital children stateless due to legitimation by their fathers, or discourage the legitimation of these children. Moreover, Congress crafted an exception to the residency requirements for married parents that effectively exempted a large group of married fathers who worked abroad for the U.S. government or American companies from the parental residency requirements, along with the child residency requirements discussed in n.8, *supra*. *See* Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. at 1139 (1940); Br. Amici Curiae of Professors of History, Political Science, and Law In Support of Petitioner.

an important factor in evaluating the validity of a gender-based classification. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr v. Orr*, 440 U.S. 268, 281 (1979); *Craig*, 429 U.S. at 199. If statelessness is the true concern, the government could simply adopt the length of residency required of mothers for fathers, or it could make individualized determinations about the risk of statelessness depending on the circumstances of the child's birth.

Unconstitutional discrimination cannot be justified on the basis of administrative convenience.[11] As this Court has noted: "[A]ny statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated.'" *Frontiero*, 411 U.S. at 690. *See also Wengler*, 446 U.S. at 152; *Craig*, 429 U.S. at 197-98. Congress previously has replaced laws relying on gender classifications with gender-neutral laws providing for the automatic citizenship of children based on the citizenship of their parents. *See* Child Citizenship Act of 2000, Pub. L. No. 106-395, §§ 101-103, 114 Stat. 1631, 1631-1633 (2001) (replacing former 8 U.S.C. 1432(a), which barred children of unmarried fathers from automatically acquiring citizenship of fathers, while children of unmarried

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[11] In any case, there has been no showing that processing requests from all non-marital children of U.S. citizen mothers who have resided in the U.S. for one year, including those children with a nationality, is less burdensome than the gender-neutral alternatives.

mothers could transmit citizenship). There has been no showing as to why the government cannot implement gender-neutral options here.

*Lastly*, even prior to the adoption of heightened scrutiny as the standard of review for gender classifications, this Court recognized that a simple preference for one sex as a proxy for deciding the merits of an issue is frequently arbitrary, *Reed v. Reed*, 404 U.S. 71, 76-77 (1971), and that distinctions drawn between similarly situated men and women are generally "gratuitous" and "entirely irrational," *Wiesenfeld*, 420 U.S. at 650, 653. Because the residency requirements gratuitously differentiate based on gender, they also would not survive a more deferential standard of review.

*A fortiori*, the government has failed to demonstrate the exceedingly persuasive justification that the Constitution requires under these circumstances. The gender-based residency requirements of § 1409 are not substantially related to any interest in ensuring a sufficient connection between the parent, child, and U.S. or in reducing statelessness. They completely shut out some members of one sex from transmitting citizenship and were not designed to redress disparate treatment of women. By impermissibly distinguishing between similarly situated parents, the statute violates the right to equal protection.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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No. 15-1191

# In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

*v.*

LUIS RAMON MORALES-SANTANA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONER

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## QUESTIONS PRESENTED

In order for a United States citizen who has a child abroad with a non-U.S. citizen to transmit his or her citizenship to the foreign-born child, the U.S.-citizen parent must have been physically present or had a residence in the United States for a particular period of time prior to the child's birth. The questions presented are:

1. Whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment's guarantee of equal protection.

2. Whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.

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# In the Supreme Court of the United States

No. 15-1191

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

*v.*

LUIS RAMON MORALES-SANTANA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-41a) is reported at 804 F.3d 520. The decisions of the Board of Immigration Appeals (Pet. App. 42a-44a) and of the immigration judge (Pet. App. 45a-49a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 8, 2015, and amended on October 30, 2015. A petition for rehearing was denied on December 1, 2015 (Pet. App. 1a-2a). On February 16, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 30, 2016, and the petition was filed on March 22, 2016. The petition was granted on June 28, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-11a.

## STATEMENT

1. This case involves the constitutionality of statutory provisions governing when a child born abroad out of wedlock is granted United States citizenship at birth. Article I of the United States Constitution assigns to Congress the "Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Pursuant to that authority, Congress has conferred U.S. citizenship at birth on certain persons born outside of the United States and its outlying possessions through various provisions in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Those rules are designed to assure that children born abroad have a sufficient connection to the United States, through their legally recognized U.S.-citizen parents, to warrant conferral of U.S. citizenship, with the attendant rights and responsibilities that come with citizenship and the attendant duties of protection assumed by the U.S. government. When a foreign-born child is presumptively subject to competing claims of national allegiance because his parents are of different nationalities, Congress has required a stronger connection to the United States than when the child's national allegiance is likely to be exclusively to the United States.

At the time of respondent's birth in 1962, Pet. App. 6a, a child born outside the United States and its outlying possessions to married parents, both of whom were U.S. citizens, acquired U.S. citizenship if one of his parents had a residence in the United States or one of its outlying possessions at any time prior to the

child's birth. 8 U.S.C. 1401(a)(3).[1] The requirement was somewhat more demanding if one parent was a U.S. citizen and the other only a U.S. national:[2] the child acquired U.S. citizenship at birth if the U.S.-citizen parent had been physically present in the United States or one of its outlying possessions for a continuous period of one year. 8 U.S.C. 1401(a)(4).[3]

The requirement was markedly different if only one parent was a U.S. citizen and the other was an alien. In that situation, there was only one legally recognized parent through whom the child could establish the requisite connection to the United States, and there was, moreover, a competing connection to another country—the country of which the child's other parent was a citizen. The INA accordingly provided that when a child was born abroad to parents in

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[1] Unless otherwise noted, all references to 8 U.S.C. 1401 and 1409 are to the 1958 edition of the United States Code, the version of the relevant nationality provisions that were enacted as part of the INA and were in effect when respondent was born. Sections 1401 and 1409 have since been amended in various respects. Immigration and Nationality Act Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3657. Those amendments do not apply unless the child was born on or after November 14, 1986, and thus do not govern respondent's citizenship claim. See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2618-2619.

[2] Although all U.S. citizens are also U.S. nationals, "one can be a national of the United States and yet not a citizen." *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (Ginsburg, J., dissenting) (citing 8 U.S.C. 1101(a)(22)). "The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island." *Ibid.*

[3] Although Section 1401 generally refers to "outlying possessions" in addition to the "United States," for simplicity this brief will henceforth refer only to the "United States."

such a marriage, the child acquired U.S. citizenship at birth only if, at the time of the child's birth, the U.S.-citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned 14 years of age. 8 U.S.C. 1401(a)(7).[4]

While 8 U.S.C. 1401 governed the granting of U.S. citizenship to children born abroad to married parents, 8 U.S.C. 1409 governed the granting of citizenship to children born abroad out of wedlock. Section 1409(a) stated a general rule that certain provisions of Section 1401(a)—including paragraphs (a)(3), (a)(4), and (a)(7), discussed above—shall apply to a child born out of wedlock on or after the effective date of the 1952 Act if the child's paternity was established "by legitimation" while the child was under age 21. 8 U.S.C. 1409(a). Thus, upon legitimation, Section 1409(a) imposed the same conditions that would have applied if the parents had been married at the time of the child's birth. See *Nguyen* v. *INS*, 533 U.S. 53, 59-73 (2001) (discussing current version of Section 1409(a), requiring, *inter alia*, that paternity be established while the child was under age 18). Thus, if both

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[4] In the 1986 Act, Congress reduced the period of required physical presence in the United States to a total of five years, two of which must be after the parent turned 14. 1986 Act § 12, 100 Stat. 3657 (8 U.S.C. 1401(g)). In the 1934, 1940, and 1952 versions of the relevant statutory provisions, the child was required to satisfy an additional requirement that he reside in the United States for a particular period of time by a specified age. See Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797; Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139; INA § 301(b), 66 Stat. 236 (8 U.S.C. 1401(b)). That type of requirement was eliminated in 1978, Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046, and is not at issue in this case.

parents were U.S. citizens, even though unmarried at the time of the child's birth, it was sufficient upon later legitimation that one parent had a residence in the United States for any length of time prior to the child's birth. See 8 U.S.C. 1401(a)(3). But, as with married couples, if one parent was a U.S. citizen and the other was an alien, the U.S.-citizen parent must have been physically present in the United States for a total of ten years prior to the child's birth, at least five of which were after attaining the age of 14. See 8 U.S.C. 1401(a)(7).

Section 1409(c) created an additional basis for the granting of citizenship to a child born out of wedlock abroad. It provided that, notwithstanding 8 U.S.C. 1409(a), just discussed, such a child shall be a U.S. citizen if his mother was a U.S. citizen and had previously been physically present in the United States for a continuous period of one year. 8 U.S.C. 1409(c).[5] That rule reflected the reality that, when a child is born out of wedlock, there ordinarily is only one legally recognized parent—the mother—at the time of birth. Congress determined that, under those circumstances, the mother's one year of continuous physical presence in the United States prior to the child's birth abroad was sufficient to create the requisite connection to the United States.[6] That was the same one-year require-

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[5] Section 1409(c) provided that such a child would acquire his mother's "nationality status." If the child's mother was a U.S. citizen and satisfied the requirements of Section 1409(c), the child would be a citizen as well. See *Miller*, 523 U.S. at 467 n.2 (Ginsburg, J., dissenting).

[6] In certain circumstances, a child born out of wedlock abroad to a U.S.-citizen mother could acquire citizenship under the general rule in Section 1409(a) if his mother did not satisfy the one-year

ment Congress imposed under Section 1401(a)(4) when one parent was a U.S. citizen and the other was a U.S. national.

Section 1409(c) also ensured that the U.S. citizenship of a child born out of wedlock abroad to a U.S.-citizen mother who satisfied its physical-presence requirement could be definitively determined at birth, regardless of whether the father's parental status was legally established by legitimation at a later date. Section 1409(c) accomplished that result by providing that such a child was a U.S. citizen at birth "[n]otwithstanding the provision of subsection (a)" of Section 1409—notwithstanding, for example, that an alien father later legitimated the child, which under Section 1409(a) could otherwise have triggered the ten- and five-year physical-presence requirement because there were then two parents of different nationalities.

2. a. In 1962, respondent was born in the Dominican Republic to unmarried parents. Pet. App. 6a. Respondent's mother was a citizen of the Dominican Republic. *Ibid.* At the time of respondent's birth, his father was a U.S. citizen who had not spent more than five years in the United States after his 14th birthday. *Ibid.* Respondent's father legitimated respondent when he married respondent's mother in 1970, before

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continuous-physical-presence requirement in Section 1409(c). That would be true, for example, if (1) the father whose paternity was later established was also a U.S. citizen, in which case the child would be a U.S. citizen from birth under Section 1401(a)(3) if either parent had a residence in the United States for *any* period prior to the child's birth; or (2) the U.S.-citizen mother could satisfy the requirement of a *total* of ten- and five-years of physical-presence applicable under Section 1401(a)(7) when an alien father later legitimated the child, even though the mother did not have one year of *continuous* physical presence. See n.10, *infra*.

respondent turned 21. *Ibid.* Respondent was admitted to the United States as a lawful permanent resident in 1975. *Ibid.* Respondent's father died in 1976. *Ibid.*

In 1995, respondent was convicted of first-degree burglary, second-degree robbery, four counts of attempted murder, and second-degree criminal possession of a weapon. Pet. App. 46a. In 2000, respondent was placed in removal proceedings, in which he admitted that he was removable as an alien who had committed aggravated felonies and a firearms offense. *Id.* at 45a-46a. The immigration judge denied his applications for asylum and withholding of removal and ordered him removed from the United States. *Id.* at 47a-49a. Respondent filed motions for reconsideration and to reopen, see *id.* at 42a, claiming for the first time that he was a U.S. citizen by virtue of his father's U.S. citizenship. *Id.* at 8a, 42a-44a. The Board of Immigration Appeals (BIA) denied the last such motion in 2011 on the ground that his father had not satisfied the physical-presence requirements in 8 U.S.C. 1401(a)(7). Pet. App. 42a-44a.

b. Respondent petitioned for review of the BIA's decision in the Second Circuit. The court first rejected respondent's st utory arguments that he was a U.S. citizen at bir under 8 U.S.C. 1401. Pet. App. 8a-14a. The court held, however, that the statutory provisions governing the citizenship status at birth of a child born abroad out of wedlock to one U.S.-citizen parent and one alien parent violate the equal protection rights of respondent's U.S.-citizen father. *Id.* at 14a-41a.

Applying intermediate scrutiny, Pet. App. 16a-20a, the court of appeals acknowledged that the govern-

ment's interest in ensuring that foreign-born children of parents with different nationalities have a sufficient connection to the United States is important and justifies imposing a physical-presence requirement for the child's parent or parents. However, the court held that that interest did not justify imposing a different physical-presence requirement when the child was born out of wedlock to a U.S.-citizen mother. *Id.* at 21a-25a. The court also rejected the government's argument that Congress imposed a different physical-presence requirement on U.S.-citizen mothers of children born out of wedlock in order to reduce statelessness. *Id.* at 25a-32a. But the court further held that, even if Congress sought to reduce statelessness, its pursuit of that concededly important goal violated equal protection because, in the court's view, gender-neutral means of serving that interest were available. *Id.* at 32a-34a.

As a remedy, the court of appeals declared that respondent "is a citizen [of the United States] as of his birth," Pet. App. 41a, by extending the one-year continuous-physical-presence requirement in Section 1409(c) to unwed U.S.-citizen fathers (but not to married U.S.-citizen mothers and fathers). *Id.* at 36a. It rejected the government's argument that the proper remedy was to extend to unmarried U.S.-citizen mothers the ten- and five-year physical-presence requirements that otherwise applied under Section 1401(a)(7) when only one parent was a U.S. citizen and the other was an alien. *Id.* at 35a-41a.

## SUMMARY OF ARGUMENT

I. Pursuant to its plenary power under the Constitution over naturalization, Congress has enacted a set of rules governing the acquisition of U.S. citizenship

at birth by individuals born abroad. Those rules are entitled to deferential rational-basis review. But even if this Court applies the type of heightened scrutiny applicable to gender-based equal protection challenges in the domestic context, the statutory scheme in 8 U.S.C. 1401 and 1409 is constitutional.

The generally applicable rules, set forth in 8 U.S.C. 1401, embody an important congressional judgment: when a child born abroad has parents of different nationalities, a stronger connection to the United States should be required than is required when the child's national allegiance is likely to be exclusively to the United States. The rules in Section 1401 implement that judgment, and do so in a manner that is gender-neutral: which rule applies depends not on the gender of a child's U.S.-citizen parent, but on whether the child has two legally recognized U.S.-citizen parents or has one legally recognized U.S.-citizen parent and one alien parent. With respect to the former category, Congress determined that a minimal physical connection between one of the child's parents and the United States was sufficient because influences from the child's parents would be American. With respect to the latter category, Congress determined that a longer ten-year physical connection between a child's U.S.-citizen parent and the United States was necessary because the child's alien parent would introduce a competing national influence and claim on national allegiance. The rules in Section 1401 are thus tailored to serve important government interests. And because those rules are gender neutral, they do not violate equal protection.

Section 1409 of Title 8 sets forth a complementary set of rules applicable to children born out of wedlock

abroad. Although the terms of Section 1409 do refer to a child's mother and father, that distinction is based on material differences in the legal relationship a mother has to her child at the moment of the child's out-of-wedlock birth, compared to the legal relationship the father has (or, more accurately, lacks) at that moment. When the relevant provisions were adopted in 1940 (and amended in 1952), it was well established that, in most of the world, the mother of a child born out of wedlock was the only legally recognized parent at the time of the child's birth. The father of such a child could later take steps to legally establish his paternity, but unlike the child's mother, he was generally not legally recognized as the child's parent by virtue of the birth itself. Thus, when a child was born out of wedlock abroad and that child's only legally recognized parent (his mother) was a U.S. citizen, Congress reasonably treated the child in a manner similar to a child with two legally recognized U.S.-citizen parents and required only a minimal physical connection to the United States. If that child's father subsequently established his legal paternity, Congress then treated the child as if his parents had been married at the time of his birth, applying the same ten- and five-year physical-presence requirements in Section 1401 that applied to the children of married parents with different nationalities.

Section 1409, as enacted in 1952, also served other equally important government interests. Congress was aware that the relevant provision of the Nationality Act of 1940 (1940 Act), ch. 876, 54 Stat. 1137, could have been construed to delay acquisition of U.S. citizenship to a child born out of wedlock abroad to a U.S.-citizen mother until either the child's father

legitimated him and satisfied the ten- and five-year physical-presence requirements or the child reached the age of majority without being legitimated. Sensitive to problems of statelessness, Congress revised that provision by specifying in Section 1409(c) that a child whose mother satisfied the one-year continuous-presence requirement was a citizen at birth "[n]otwithstanding" Section 1409(a), which applied different rules upon legitimation by a U.S.-citizen father. Section 1409(c) also reflected the reality that, in nearly all countries where citizenship was acquired based on the citizenship of a child's parents (rather than based on the place of the child's birth), the only parent from whom a child born out of wedlock could acquire citizenship at birth was his mother.

The court of appeals erred in speculating that the rules set forth in Sections 1401 and 1409 were based on stereotypes about which parent should have custody and care of a child born out of wedlock. Those rules were based on the legal reality that most countries considered the mother of a child born out of wedlock to be the child's only legally recognized parent at birth. When legislating concerning individuals born abroad, Congress cannot be expected to ignore the state of the law throughout the world.

II. Even if this Court were to determine that the different physical-presence requirements in Sections 1401 and 1409 violate equal protection, respondent is not entitled to the relief he seeks, namely relief from an order of removal based on a determination that he has been a citizen from birth. Congress chose to apply the more stringent physical-presence requirements in Section 1401 to a substantial majority of children born abroad to one U.S.-citizen parent and one alien par-

ent. The proper way to cure any equal protection violation would be to apply, on a prospective basis, the longer physical-presence requirements in Section 1401 to children born out of wedlock to U.S.-citizen mothers. That is because the Judiciary may not properly declare a foreign-born person a citizen when Congress has not so provided, and because of the need to preserve necessary flexibility for Congress to address the issue going forward. The court of appeals' decision to apply the shorter physical-presence requirement in Section 1409(c) to children born out of wedlock to U.S.-citizen fathers contravened Congress's intent and could complicate future action by Congress. Equalizing the treatment of all children born abroad to one U.S.-citizen parent and one alien parent, as suggested by the government, would eliminate any equal protection problem and would most faithfully preserve Congress's policy choices.

## ARGUMENT

Pursuant to its plenary constitutional power over naturalization, Congress has provided by statute that some foreign-born individuals are United States citizens from birth by virtue of their connection, through one or two U.S.-citizen parents, to the United States. In determining which foreign-born individuals should be considered U.S. citizens on that basis, Congress must balance competing national interests and take account of widely varied foreign laws. Congress is entitled to great deference in pursuing that constitutional responsibility, which inevitably touches on matters of sovereignty, foreign relations, and equitable considerations that are committed to the Legislative Branch. But whether this Court applies a deferential or heightened level of scrutiny, Congress does not

violate the Constitution by treating different categories of foreign-born children differently when the children—and their U.S.-citizen parents—were not similarly situated to each other. And when a child was born out of wedlock abroad to a U.S.-citizen mother, the child was not similarly situated to a child born out of wedlock abroad to an alien mother and a U.S.-citizen father whose paternal status was established only later as a legal matter. The court of appeals therefore erred in holding that the relevant provisions of 8 U.S.C. 1401 and 1409 violate equal protection. The court compounded its error when it remedied the perceived constitutional problem by extending U.S. citizenship to respondent—and to an untold number of other individuals who never had reason to consider themselves U.S. citizens. In doing so, the court of appeals exceeded its constitutional authority and ignored congressional intent.

## I. THE RULES ESTABLISHED BY 8 U.S.C. 1401 AND 1409 FOR CONFERRAL OF CITIZENSHIP ON CHILDREN BORN ABROAD OUT OF WEDLOCK ARE FULLY CONSISTENT WITH THE CONSTITUTION

### A. Congressional Enactments Governing Immigration And Naturalization Are Subject To A Deferential Standard Of Review

As this Court has long held, the Fourteenth Amendment "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). Although "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States," a "person born out of the jurisdiction of the United States can only

become a citizen by being naturalized, either by treaty * * * or by authority of Congress." *Id.* at 702-703. There is no dispute in this case that respondent was born outside the United States and is therefore not constitutionally entitled to citizenship. *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971).

Article I of the Constitution vests in Congress the authority "To establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4; see *Wong Kim Ark*, 169 U.S. at 688. Authority over naturalization is thus "vested exclusively in Congress." *Wong Kim Ark*, 169 U.S. at 701. That authority encompasses both the power to grant citizenship to children who are born abroad of U.S.-citizen parents *and* the power not to do so. Acquisition of citizenship by such a child is thus entirely "dependent * * * upon statutory enactment." *Bellei*, 401 U.S. at 828. For at least three reasons, the Constitution's vesting in Congress of plenary authority to decide which persons born abroad should be granted U.S. citizenship requires that judicial review of Congress's judgments be highly deferential.

First, determinations about what classes of persons are eligible for statutory citizenship are quintessentially legislative. The Naturalization Clause reflects the fundamental proposition, inherent in sovereignty, that "[e]very society possesses the undoubted right to determine who shall compose its members." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893) (citation omitted); see 2 The Records of the Federal Convention of 1787, at 238 (Max Farrand ed., 1966) (remarks of Gouverneur Morris) ("[E]very Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be

admitted."). Deciding which persons born abroad —who have not yet, and may never, set foot in the United States—should be granted U.S. citizenship involves fundamental questions of who should be entitled to share in the benefits and responsibilities of our constitutional democracy, including the protection of our Nation while abroad. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265-266 (1990); *Dames & Moore* v. *Regan*, 453 U.S. 654, 663-665, 676-679 (1981). That determination requires a complex weighing of competing considerations, including the presence or likelihood of ties to the United States, competing ties to other countries, equitable and moral factors, the laws of other nations, and the potential for dual citizenships or statelessness.

Second, the power to confer or deny citizenship on individuals born abroad—individuals who are "alien[s] as far as the Constitution is concerned"—is also an aspect of the power to exclude aliens from the Nation. *Miller* v. *Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring in the judgment). That power "is an incident of every independent nation." *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889). Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

Third, the United States' "policy toward aliens" is "vitally and intricately interwoven with * * * the conduct of foreign relations," a power that likewise is

vested in the political Branches. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). "Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976).

Although the Judiciary has a crucial role in protecting rights accorded under the Constitution to persons who have been granted citizenship by the Fourteenth Amendment or by Congress, and to those aliens who are in the United States, it is not the province of the Judiciary to determine which foreign-born persons should be permitted to become members of our Nation in the first place. Nor are the courts well-positioned to second-guess Congress's complex judgments about what classes of persons should be eligible for statutory citizenship.

As this Court explained in *Plyler* v. *Doe*, 457 U.S. 202 (1982), "Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." *Id.* at 225. That principle of deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo* v. *Bell*, 430 U.S. 787, 792, 793 n.4 (1977) (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); see also *id.* at 792 ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339

(1909)). Accordingly, Congress's judgments regarding the requirements that must be satisfied in order for a child born abroad to acquire U.S. citizenship at birth are entitled to great deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for those judgments. *Id.* at 794 (citation omitted).

The court of appeals erred in declining to adhere to that principle. The court declined to follow *Fiallo*, because the court viewed it as addressing only "Congress's 'exceptionally broad power' to admit or remove non-citizens." Pet. App. 17a (quoting *Fiallo*, 430 U.S. at 794). But the power to grant or deny citizenship to individuals born abroad is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is a different aspect of the same overarching sovereign power. In any event, the plaintiffs in *Fiallo* included U.S. citizens, 430 U.S. at 790 n.3, who unsuccessfully argued that rational-basis review should not apply because the statutory provision at issue implicated "constitutional interests of United States citizens and permanent residents," who sought the excluded aliens' admission to this country. *Id.* at 794 (citation omitted). If rational-basis review applied in *Fiallo* to the aliens' reliance on the constitutional interests of U.S. citizens, it should apply equally to respondent's claim, which likewise rests entirely on the asserted constitutional interests of a U.S. citizen (respondent's father).

The court of appeals therefore erred in applying heightened scrutiny to Sections 1401 and 1409. As explained below, however, the court of appeals further erred in holding that the statutory scheme is unconstitutional under the heightened scrutiny applicable

to gender-based equal protection claims in the domestic context. Cf. *Nguyen* v. *INS*, 533 U.S. 53, 60-61, 72-73 (2001) (rejecting gender-based equal protection challenge to successor statutory scheme under intermediate scrutiny and declining to decide "whether some lesser degree of scrutiny pertains because the statute implicates Congress's immigration and naturalization power.").

### B. The Rules Established By Sections 1401 and 1409 Are Substantially Related To The Government's Important Interest In Ensuring That A Child Born Abroad Has A Sufficiently Strong Connection To The United States To Warrant Conferral Of U.S. Citizenship At Birth

In exercising its plenary authority over naturalization, Congress has been cautious in extending U.S. citizenship at birth to foreign-born individuals, consistently requiring that they satisfy statutory criteria designed to ensure that they have a sufficiently robust connection to the United States to warrant the conferral of citizenship. This Court in *Nguyen* recognized that Congress has a legitimate "desire to ensure some tie between this country and one who seeks citizenship." 533 U.S. at 68. Of particular relevance here, when a foreign-born child is presumptively subject to competing claims of national allegiance because his parents have different nationalities, Congress has required a stronger connection to the United States than it has when the child's national allegiance is likely to be exclusively to the United States. The physical-presence requirements codified in Sections 1401 and 1409 are constitutionally sound means of serving that interest.

### *1. Congress has always used physical-presence or residence requirements to ensure that the U.S.-citizen parent of a foreign-born child has sufficient ties to the United States to justify conferring U.S. citizenship on the child*

a. Since 1790, Congress has, "by successive acts," provided "for the admission to citizenship of * * * foreign-born children of American citizens, coming within the definitions prescribed by Congress." *Wong Kim Ark*, 169 U.S. at 672. From the outset, Congress has sought to ensure that children born abroad would not become citizens by virtue of a mere blood relationship to a U.S. citizen, without any other tie to this country. Congress has accomplished that goal primarily by extending citizenship to foreign-born children *only* if a U.S.-citizen parent satisfied a statutory requirement that the parent was physically present in (or had a residence in) the United States for a specified period of time.

The first such statute stated that a child born abroad to a U.S. citizen shall be a U.S. citizen "*[p]rovided*, [t]hat the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. Congress maintained that emphasis on paternal residence through succeeding statutes enacted in 1795, 1802, 1855, and 1907. Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 415; Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 155; Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604; Act of Mar. 2, 1907 (1907 Act), ch. 2534, § 6, 34 Stat. 1229; see *Bellei*, 401 U.S. at 823-824. In 1934, Congress eliminated the sole focus on the father's citizenship (and residence), instead providing on a prospective basis that any child "whose father or mother

or both * * * is a citizen" would be a citizen if at least one citizen parent satisfied a residency requirement. Act of May 24, 1934 (1934 Act), ch. 344, § 1, 48 Stat. 797. None of those statutes mentioned children born out of wedlock.

b. In 1940, Congress (at President Roosevelt's request) undertook a comprehensive overhaul of the Nation's nationality laws. The resulting Nationality Act of 1940, ch. 876, 54 Stat. 1137, again addressed the circumstances in which a foreign-born child of at least one U.S.-citizen parent would be granted U.S. citizenship from birth. Congress crafted that law against the backdrop of World War I, which threatened the lives, liberty, and property of U.S. citizens abroad, and at a time when democracy was under attack throughout the world and the United States faced grave difficulties in defending its interests and citizens abroad. The 1940 Act was the product of "a studied effort to * * * facilitate the naturalization of worthy candidates and, at the same time, protect the United States against adding to its body of citizens persons who would be a potential liability rather than an asset." H.R. Rep. No. 2396, 76th Cong., 3d Sess. 2 (1940).

The provisions of the 1940 Act governing the citizenship of foreign-born children of married parents imposed varying physical-presence or residency requirements depending on the citizen status of the child's parents. The least demanding requirement applied when a foreign-born child had two U.S.-citizen parents; in those cases, the child was granted U.S. citizenship from birth if at least one parent had resided in the United States at some point before the child's birth. 1940 Act § 201(c), 54 Stat. 1138. Congress could reasonably expect that the child of two

U.S. citizens, at least one of whom had resided in the United States, would have a sufficient connection to and develop a sufficiently strong allegiance to the United States to warrant granting U.S. citizenship at birth. See 1 House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess., *Nationality Laws of the United States: Message from the President of the United States Transmitting a Report Proposing a Revision and Codification of the Nationality Laws of the United States, Prepared at the Request of the President of the United States, by the Secretary of State, the Attorney General, and the Secretary of Labor* 11 (Comm. Print 1938) (*Nationality Laws of the United States*) (where both parents of foreign-born children are U.S. citizens, "it is altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in character").

In contrast, when a foreign-born child had connections to two different countries through parents with different nationalities, and therefore was likely to have competing national allegiances, Congress required a more established connection between the U.S.-citizen parent and the United States. Thus, when a child was born abroad to married parents of different nationalities, Congress provided that the child would be a U.S. citizen from birth only if the U.S.-citizen parent had ten years' residence in the United States, at least five of which were after attaining age 16. 1940 Act § 201(g), 54 Stat. 1139.

The requirement of that greater connection to the United States in part reflected a concern that individuals born and residing abroad will be "alien in all their characteristics and connections and interests," not-

withstanding a biological connection to a U.S. citizen. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Superseded by H.R. 9980 Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 37 (printed 1945) (1940 Hearings); see *Nationality Laws of the United States* 14. The 1940 Act thus embodied a determination to "prevent the perpetuation of United States citizenship by citizens born abroad who remain there, or who may have been born in the United States but who go abroad as infants and do not return to this country." S. Rep. No. 2150, 76th Cong., 3d Sess. 4 (1940) (1940 Senate Report). "Neither such persons nor their foreign-born children," Congress concluded, "would have a real American background, or any interest except that of being protected by the United States Government while in foreign countries." *Ibid.* And conferring citizenship at birth on foreign-born children of parents of different nationalities presented "greater difficulties" and "require[d] correspondingly stricter limitations." 1940 Hearings 423.

c. Congress also was reluctant to create dual citizens except in rare cases. This Court has recognized on several occasions that "Congress has an appropriate concern with problems attendant on dual nationality." *Bellei*, 401 U.S. at 831; see *Kawakita* v. *United States*, 343 U.S. 717, 733 (1952) ("One who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting."). During Congress's 1940 overhaul of the Nation's nationality laws, Representative Edward Rees—one of the primary participants in the committee tasked with preparing the new code—explained that

"[u]nder our laws the State Department has had much difficulty in trying to protect" dual nationals abroad. 1940 Hearings 241; see 1940 Senate Report 4 ("The State Department has also experienced considerable trouble through persons possessing dual nationality—that of the United States and of a foreign country—who continue to reside in the foreign country for many years while insisting upon protection by the Government of the United States."); see also Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* 11 (1934) (Seckler-Hudson) ("The position of individuals possessing two or more nationalities is a very awkward one since two or more states may claim them as subjects and hence claim their allegiance. In the event of a war arising between such states a conflict of duties is created for the individual who is claimed as a national by each.").

This Court has recognized the risk that "[c]ircumstances may compel one who has a dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship." *Kawakita*, 343 U.S. at 736. "An American who has a dual nationality may find himself in a foreign country when it wages war on us. The very fact that he must make a livelihood there may indirectly help the enemy nation," *id.* at 734, and he could be conscripted into military service against the United States. Congress therefore had compelling reasons to limit the extension of citizenship from birth to only those children born abroad to parents of different nationalities who could establish, through a U.S.-citizen parent, a sufficiently strong connection to the United States.

*2. A foreign-born child with two legally recognized parents, only one of whom was a U.S. citizen, was not similarly situated to a foreign-born child with only one legally recognized parent, who was a U.S. citizen*

a. Before the 1940 Act, none of the laws granting citizenship to foreign-born children had expressly addressed the status of children born abroad out of wedlock. For many years, however, the State Department interpreted and applied the 1907 and 1934 Acts to afford citizenship to such children who had a U.S. citizen father, if the child was subsequently "legitimated" by marriage of the child's mother and father or otherwise in accordance with the governing state or foreign law. See 1940 Hearings 431; 39 Op. Att'y Gen. 556 (1937); 32 Op. Att'y Gen. 162 (1920). In such cases, the relationship between father and child was retroactively "recognized as existing from the date of the child's birth," 32 Op. Att'y Gen. at 164, and the child was treated for purposes of acquiring citizenship as if his parents had been married at the time of his birth.

The State Department had also recognized as U.S. citizens children born abroad out of wedlock to U.S.-citizen mothers when the child's father had not legally established paternity through legitimation or adjudication and the U.S.-citizen mother was therefore the only legally recognized parent—reasoning that, in such cases, the mother stood in the position of the father for statutory purposes. 1940 Hearings 431. But the Attorney General rejected that practice in 1939, at least with respect to children born before the 1934 Act. 39 Op. Att'y Gen. 397 (1939); 39 Op. Att'y Gen. 290 (1939). In so doing, the Attorney General

observed that the issue of citizenship to children born abroad out of wedlock would be a proper subject for congressional action. 39 Op. Att'y Gen. at 291.

b. Congress took up that issue in its overhaul of the Nation's nationality laws in 1940. The first paragraph of Section 205 of the 1940 Act stated that "[t]he provisions of section 201" (which set forth the rules applicable to foreign-born children of married parents) "hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 1940 Act § 205, 54 Stat. 1139. The second paragraph of Section 205 further stated that, "*[i]n the absence of such legitimation or adjudication*, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status." 1940 Act § 205, 54 Stat. 1140 (emphasis added).

The first paragraph of Section 205 thus treated children born out of wedlock to U.S.-citizen mothers and those born to U.S.-citizen fathers the same (in terms of a physical-connection or residence requirement) in cases where the father legitimated the child before the child reached the age of majority—treating the children as if their parents had been married when the child was born. If both parents were U.S. citizens, the more lenient rule in Section 201(c) applied, requiring only prior U.S. residence by one parent. But if, as in respondent's case, only one parent was a U.S. citizen, the longer residence requirements in Section

201(g) applied, just as they would have if the child's parents had been married when the child was born.

But in addition to that general rule, the second paragraph of Section 205 provided that, when the unwed father (whether U.S.-citizen or alien) failed to take the steps necessary to legally establish his relationship to his child, the child was (at least retroactively) considered to have acquired U.S. citizenship from birth if the child's unwed mother was a U.S. citizen and had previously resided in the United States or an outlying possession. But Section 205 was ambiguous in one important respect: the use of the phrase "in the absence of legitimation or adjudication" left open the possibility that the citizenship of a child born out of wedlock abroad to a U.S.-citizen mother could not be determined until either the child's father legitimated him or he reached the age of majority, or that he would be divested of citizenship upon legitimation. See *Matter of M—*, 4 I. & N. Dec. 440, 442-445 (B.I.A. 1951).

Under the 1940 Act, when a child had two legally recognized U.S.-citizen parents, Congress required only a minimal physical connection (prior residency of any length) between at least one U.S.-citizen parent and the United States. 1940 Act §§ 201(c), 205, 54 Stat. 1138-1139. A similarly minimal physical connection was deemed sufficient when a foreign-born child had only one legally recognized parent at birth and that parent was a U.S. citizen. 1940 Act § 205, 54 Stat. 1140. By contrast, when a foreign-born child had two legally recognized parents, only one of whom was a U.S. citizen—because his parents were married at the time of his birth or were unmarried but his father later legitimated him—Congress understood that the

child would likely be subject to competing national loyalties. In those instances (like respondent's), Congress required that the U.S.-citizen parent establish a stronger physical connection to the United States as a means of ensuring that the child would form a stronger cultural and emotional tie and allegiance to the United States to offset any competing connection to another country.

c. A decade later, Congress revisited the subject of children born abroad out of wedlock when it enacted Section 309 of the INA, 66 Stat. 238 (8 U.S.C. 1409), in 1952. Congress made two relevant changes: (1) it required that, in order for a child born abroad out of wedlock to a U.S.-citizen mother to be granted U.S. citizenship at birth, the mother must have been physically present in the United States for one continuous year (rather than merely residing in the United States at some point) before the child's birth; and (2) made clear that the foreign-born child whose U.S.-citizen mother satisfied that physical-presence requirement would retain U.S. citizenship from birth regardless of whether his father later legitimated him. 8 U.S.C. 1409(a) and (c).

The first change ensured a somewhat stronger connection between the U.S.-citizen mother and the United States in order for her child to obtain citizenship. The second change eliminated the qualifier "[i]n the absence of such legitimation or adjudication" that had created uncertainty in Section 205 of the 1940 Act, 54 Stat. 1140, which had granted citizenship from birth to a child born out of wedlock abroad to a U.S.-citizen mother. The new provision replaced that qualifier with the phrase "[n]otwithstanding the provision of" subsection (a) of 8 U.S.C. 1409, which provided

that the rule for the children of married parents would apply to the children of unmarried parents upon legitimation. That amendment made explicit that a child born out of wedlock to a U.S.-citizen mother could have his citizenship definitively determined at birth—without regard to whether the father's paternity was later legally established, through legitimation, which otherwise could have triggered the ten- and five-year physical-presence requirements under Sections 1401(a)(7) and 1409(a) applicable when there were two parents of different nationalities.

Although Section 1409(c) used gendered terms by referring to "the mother" of a child born out of wedlock, the differential treatment under that provision, as under the 1940 Act, turned on whether a foreign-born child had one legally recognized parent or two at the time of his birth.

d. Respondent errs in disputing (Br. in Opp. 14-16) that, at the moment of birth, the mother of a child born out of wedlock was typically treated throughout the world as the child's only legal parent. Although the father of such a child could establish a legally recognized relationship by marrying the mother or taking another step prescribed by law, in most of the world his relationship to his child was not legally recognized at the time of the child's birth. As one expert on international law wrote in the early years of the Twentieth Century: "If children are illegitimate, their father being necessarily *uncertain in law*, the nationality of the mother is their only possible root of nationality where national character is derived from personal and not from local origin. Accordingly, it is almost everywhere the rule that they belong to the state of which the mother is subject." William Ed-

ward Hall, *A Treatise on International Law* § 69, at 279 (8th ed. 1924) (*Treatise on International Law*) (emphasis added). Former State Department official Frederick Van Dyne agreed, concluding that "[t]he nationality of an illegitimate child born to an American mother abroad would, by the law of nations, follow that of the mother." Frederick Van Dyne, *Citizenship of the United States* 49 (1904); accord P. Weis, *Nationality and Statelessness in International Law* 97 (1956) (describing *jus sanguinis* as "acquisition of nationality by descent whereby, as a rule, an illegitimate child acquires at birth the nationality of his mother").

When Congress overhauled the Nation's nationality laws in 1940, it understood that the mother of a child born out of wedlock is typically the only legally recognized parent at the time of the child's birth. See 1940 Hearings 62-63 (Richard W. Flournoy, Assistant Legal Adviser, U.S. Department of State) (noting that, when a child is born out of wedlock, he has "only one legal parent" unless or until his father legitimates the child). Congress had before it a comprehensive study of foreign citizenship laws, undertaken by an Assistant to the Legal Adviser in the Department of State, which determined that 30 of the countries studied had enacted laws governing the citizenship of children born out of wedlock. The laws of 29 of those 30 countries provided that the child acquired the citizenship of his mother at birth (assuming the mother was a citizen of the relevant country), and in 19 of those 29 countries, the child would take the father's citizenship upon legitimation. Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-

259 & n.38 (1935) (Sandifer) (cited in 1940 Hearings 431). The study recognized that in most countries a child could not obtain his father's citizenship unless or until the father took "any act *legally establishing* filiation." *Id.* at 258 (emphasis added). The study further determined that Turkey was the *only* country that by law permitted a child born out of wedlock to "follow the father's nationality in the absence of any provision concerning *legal establishment* of the relationship." *Id.* at 258-259 (emphasis added). Thus, to the extent foreign nations (that did not confer citizenship based on place of birth) had codified laws governing the citizenship of a child born out of wedlock within their borders, nearly all provided that such a child would acquire the citizenship of his mother at the time of his birth, because at that point his unwed father would have no "legally establish[ed]" relationship to the child. *Id.* at 258; see 1940 Hearings 431 (noting that, in the referenced countries, a child born out of wedlock would take the nationality of his mother "in the absence of any act *legally establishing* filiation") (emphasis added); accord generally Richard W. Flournoy and Manley O. Hudson, *A Collection of Nationality Laws of Various Countries, as Contained in Constitutions, Statutes and Treaties* (1930) (cited in 1940 Hearings 431).

This Court has similarly recognized that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see also *Lehr* v. *Robertson*, 463 U.S. 248, 266-268 (1983); *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979) (opinion of Stewart, J.); cf. *Adoptive Couple* v. *Baby Girl*, 133 S. Ct. 2552, 2558-

2559 (2013). Indeed, this Court explained in *Nguyen* that a "significant difference" exists "between the[] respective relationships" of those mothers and fathers "to the potential citizen at the time of birth." 533 U.S. at 62. In particular, the Court explained that, while "the fact of parenthood" is established for an unwed mother "at the moment of birth," *id.* at 68, "that legal determination with respect to fathers" may constitutionally be subject to "a different set of rules" because the two parents are not similarly situated, *id.* at 63. See *Miller*, 523 U.S. at 443 (Stevens, J.) ("[I]t is not merely the sex of the citizen parent that determines whether the child is a citizen under the terms of the statute; rather, it is an event creating a *legal relationship* between parent and child—the birth itself for citizen mothers, but postbirth conduct for citizen fathers and their offspring.") (emphasis added).[7]

e. When respondent was born out of wedlock in the Dominican Republic, his mother was not a U.S. citizen, and respondent therefore had no legally recognized connection to the United States *at all*, much less a claim to U.S. citizenship. When respondent's U.S.-citizen father later legitimated respondent by marrying respondent's mother, respondent then had two legal parents, one of whom remained an alien. The

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[7] See also *Nguyen*, 533 U.S. at 61 ("[A] citizen mother expecting a child and living abroad has the right to reenter the United States so the child can be born here and be a 14th Amendment citizen. From one perspective, then, the statute simply ensures equivalence between two expectant mothers who are citizens abroad if one chooses to reenter for the child's birth and the other chooses not to return, or does not have the means to do so. This equivalence is not a factor if the single citizen parent living abroad is the father. For, unlike the unmarried mother, the unmarried father as a general rule cannot control where the child will be born.").

general rule in 8 U.S.C. 1409(a) and 1401(a)(7) for that two-parent situation therefore applied. Respondent's father thus was not similarly situated to a U.S.-citizen mother of a child born abroad out of wedlock, either when respondent was born or when his father later married his mother. A U.S.-citizen mother, at the time of her child's birth, would have been a legally recognized parent and typically the only such parent, and there accordingly would have been no competing parental claim of a connection to a foreign country. By contrast, when respondent was born, he had no *legal* relationship to the U.S.-citizen father who later legitimated him, and therefore no legal relationship to the United States; and when his father *did* later legitimate him and thereby established a legal relationship with him for the first time, there were then *two* legally recognized parents, each with a different nationality. It was entirely reasonable for Congress to conclude that in that situation, assurance of a sufficient connection to the United States called for application of the general rule requiring ten- and five-years of physical presence in the United States by the U.S.-citizen parent that is applicable even to *married* couples of different nationalities.

Because a U.S.-citizen mother and U.S.-citizen father were therefore not similarly situated in their relationship to a child born abroad out of wedlock, the separate provision in 8 U.S.C. 1409(c) for acquisition of citizenship by the child of an unwed U.S.-citizen mother does not violate equal protection, even under intermediate scrutiny. See *Heckler* v. *Mathews*, 465 U.S. 728, 745-750 (1984) (*Mathews*).

### C. The Rules Established By Sections 1401 and 1409 Are Substantially Related To The Government's Important Interest In Reducing The Risk That A Foreign-Born Child Of A U.S. Citizen Would Be Born Stateless

The challenged statutory provisions also served a second important interest: reducing the risk that the child of a U.S. citizen would be stateless at birth. Although the court of appeals acknowledged that reducing the risk of statelessness at birth is an important government interest, it erroneously concluded that such an interest did not justify the statutory provisions Congress enacted. Pet. App. 25a-34a.

#### *1. A child born out of wedlock abroad to a U.S.-citizen mother was at substantially greater risk of being born stateless than was the foreign-born child of a U.S.-citizen father*

The differences embodied in the physical-presence requirements in Sections 1409 and 1401 reflect the reality that children born out of wedlock abroad to a U.S.-citizen mother were at risk of having no citizenship at birth. When Congress enacted the comprehensive nationality code in 1940 and substantially revised it in 1952, that risk was greater for those children than it was for children born out of wedlock to an alien mother and a U.S.-citizen father who only later legitimated the child.

Unlike the United States, which affords citizenship on a "*jus soli*" basis to all who are born in the United States and subject to its jurisdiction, many other countries apply "*jus sanguinis*" rules, under which a child's citizenship is determined at birth through his blood relationship to a parent rather than with reference to his place of birth. See *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). In most of those countries (as

in most *jus soli* countries), when a child was born to an unwed mother, the only parent legally recognized as the child's parent at the time of the birth usually was the mother. See pp. 28-31, *supra*; see also Sandifer 258-259 & n.38 (cited in 1940 Hearings 431). Although in general the child's father could subsequently obtain the status of a legal parent through legitimation (typically through marriage) or perhaps through other formal means, the establishment of such a relationship did not occur as a result of the birth alone. Thus, when a child was born out of wedlock, the only parent on whom a child's citizenship *at the time of birth* could be based was the mother. As a result, there was a substantial risk that a child born out of wedlock to a U.S.-citizen mother in a country employing *jus sanguinis* rules of citizenship would be stateless at birth unless the child could obtain the citizenship of his mother. The court of appeals rejected this important government interest because it was not convinced "that the problem of statelessness was in fact greater for children of unwed citizen mothers than for children of unwed citizen fathers." Pet. App. 31a. That was error.

When a child was born in a *jus sanguinis* country to parents of different nationalities, the child was stateless unless either the laws of that country or the laws of the country of one parent's nationality conferred citizenship on him at the time of his birth. See, *e.g.*, Int'l Union for Child Welfare, *Stateless Children: A Comparative Study of National Legislations and Suggested Solutions to the Problem of Statelessness of Children* 7 (1947) (concluding that one of the primary categories of stateless children is "[c]hildren who are directly subjected to the consequences of the conflict

between the *jus sanguinis* and the *jus soli*"); Comm. on Nationality & Statelessness of the Am. Branch of the Int'l Law Ass'n, *Report on Nationality and Statelessness, 1950 Committee Reports of the American Branch of the International Law Association* 57 (1950). Experts in nationality and international law have long agreed that the risk of being born stateless was particularly high for a child born out of wedlock in a *jus sanguinis* country unless the child could obtain his mother's citizenship. See, *e.g.*, *Treatise on International Law* § 69, at 238 (quoted at p. 28, *supra*). Thus, when a U.S.-citizen mother had a child out of wedlock abroad in a *jus sanguinis* country, her child was at great risk of being born stateless unless U.S. law provided U.S. citizenship for the child.

The circumstances were different for a child born abroad out of wedlock to an alien mother and a U.S.-citizen father who only later established his paternal status. The same foreign laws that would put the child of the U.S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth) would *protect* the child of the U.S.-citizen father against statelessness by providing that the child would take his mother's citizenship.

In 1934, the author of the first monograph on statelessness wrote that, "if an illegitimate child is born abroad of an American mother and an alien father in a country whose nationality laws provide that the citizenship of the illegitimate child follows that of the mother, the child probably has no nationality since American statutory law has not made the status of such a child clear." Seckler-Hudson 224. The court of appeals thus erred in denying the existence of a prob-

lem that was widely acknowledged when Congress acted in 1940 and 1952.

*2. Congress enacted the challenged provisions to reduce the risk that the foreign-born child of a U.S. citizen would be born stateless*

The court of appeals compounded its error by rejecting the government's submission that Congress "enacted the 1952 Act's gender-based physical presence requirements out of a concern for statelessness." Pet. App. 31a; see *id.* at 26a-32a. Abundant evidence demonstrates that Congress was aware of and concerned about the problem of statelessness, and that Congress revised the relevant provisions in 1952 with the specific intent of reducing the risk that a child born out of wedlock abroad to a U.S.-citizen mother would be born stateless.

During and following the First and Second World Wars, Congress and the world became acutely aware of the problem of statelessness. See, *e.g.*, United Nations, *A Study of Statelessness* 4-7 (1949), http://www.unhcr.org/3ae68c2d0.pdf. The 1952 legislative overhaul enacted as the INA was undertaken pursuant to a 1947 Senate resolution that directed the Senate Judiciary Committee "to make a full and complete investigation of our entire immigration system" and to submit a report "with such recommendations for changes in the immigration and naturalization laws as [the Committee] may deem advisable." S. Res. No. 137, 80th Cong., 1st Sess. (1947), *reprinted in* S. Rep. No. 1515, 81st Cong., 2d Sess. 803 (1950) (1950 Senate Report). The same resolution directed the Committee to investigate "the situation with respect to displaced persons in Europe and all aspects of the displaced-persons problem," which encompassed the problem of

statelessness, and to submit a separate report on that topic. *Ibid.* Congress thus viewed the task of addressing problems of statelessness as part and parcel of the 1952 overhaul of the Nation's immigration and naturalization laws.

Section 205 of the 1940 Act on its face presented a real risk of statelessness. Section 205 provided that, "*[i]n the absence of such legitimation or adjudication*" "during minority," a child born out of wedlock abroad to a U.S.-citizen mother would "be held to have acquired at birth" the U.S. citizenship of his mother if his mother "had previously resided in the United States or one of its outlying territories." 1940 Act § 205, 54 Stat. 1139-1140 (emphasis added). On its face, that language suggested that the acquisition of U.S. citizenship by a child born abroad to an unmarried U.S.-citizen mother could not be determined definitively either until the father legally established his parental relationship through legitimation or adjudication or until the child reached the age of majority and no such legitimation or adjudication had occurred. Under that view of the 1940 Act, such a child would have been at great risk of having no nationality (*i.e.*, being stateless) from the time of his birth until either legitimation or majority. Although in 1951 the BIA interpreted Section 205 as granting U.S. citizenship from birth to a child born out of wedlock abroad to a U.S.-citizen mother, regardless of later legitimation (and the Department of State now concurs in that interpretation of the statute), the Department of State held the view that such a child would not be a citizen upon legitimation by his father unless his mother or father could satisfy the applicable residence requirement in Section 201. See *Matter of M—*, 4 I. & N.

Dec. at 442-445. And Congress understood that the text of Section 205 of the 1940 Act could be interpreted to render such a child stateless from his birth until such time as his father legally established paternity—or until the child reached age 21 if the father's paternity had not been legally established. See 1950 Senate Report 676 (explaining that a child born abroad out of wedlock would "have the nationality status of [his] mother," but only "in the absence of legitimation").

One of the revisions Congress enacted in 1952 was to make explicit that the conferral of citizenship based on a U.S.-citizen mother's one year of continuous physical presence in the United States was effective at the time of the child's birth and was not contingent on whether the child's father later established his own legal relationship. The enactment in the INA of 8 U.S.C. 1409(c) removed any ambiguity on that point. In explaining the purpose of that provision, the Senate Report directly addressed the issue of statelessness, stating: "This provision establishing the child's nationality as that of the [U.S.-citizen] mother *regardless* of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth.*" S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (1952 Senate Report) (emphases added).

The court of appeals dismissed that clear statement of congressional purpose: "Although the Report reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue." Pet. App. 29a n.10. That reasoning cannot be reconciled with the Report's words, which directly link the rule applicable to unmarried U.S.-citizen mothers of children born abroad to the purpose that such chil-

dren "shall have a nationality at birth." 1952 Senate Report 39.[8]

### *3. The court of appeals erred in speculating that Sections 1401 and 1409 "arguably" reflect gender stereotypes*

a. The court of appeals dismissed the government's interest in reducing the risk of statelessness based in part on speculation that the different physical-presence requirements "arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock." Pet. App. 31a. The statutory scheme reflects no such gender-based generalizations.

The challenged distinctions turned instead on rules establishing the legal status of parent and child, both abroad and in this country. The Constitution's guarantee of equal protection does not require that Congress treat men and women the same when they are not similarly situated. See, *e.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). And this Court has already held in *Nguyen*, a case also involving Section 1409, that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see

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[8] Section 1409(c) also made clear that a child born out of wedlock abroad to a U.S.-citizen mother would not be divested of his U.S. citizenship if his father legally established his paternity through legitimation. It provided that, "[n]otwithstanding the provision of" Section 1409(a), which standing alone would have triggered the longer physical-presence requirement when there were two parents of different nationalities, the foreign-born child of an unwed U.S.-citizen mother would be a U.S. citizen from birth if the mother satisfied the one-year continuous-physical-presence requirement.

also *Lehr*, 463 U.S. at 266-268; *Parham*, 441 U.S. at 355 (opinion of Stewart, J.). The difference in each parent's treatment under Section 1409(a) and (c) is attributable to what this Court in *Nguyen* described as the "significant difference between their respective relationships to the potential citizen at the time of birth," 533 U.S. at 62, not to impermissible stereotypes.

The court of appeals apparently speculated that the domestic and international laws that recognized the mother of a child born out of wedlock as the only legally recognized parent at the time of birth were developed based on stereotypes about which parent of such a child *should* care for and be responsible for the child. See Pet. App. 31a n.13. But such speculation about motivations for other laws here and abroad cannot be a basis for invalidating an Act of Congress, and Congress cannot be expected to ignore the relevant foreign and domestic laws that did exist. Indeed, Congress obviously has no authority to override the citizenship or paternity laws of other countries; and Congress has historically left it to the States to regulate familial relationships in the United States. Congress therefore did not engage in "impermissible stereotyping," *id.* at 32a, when it legislated against the reality that, in most of the world (as in the United States), when a child was born out of wedlock, his mother was his only legally recognized parent at the time of birth and therefore the only possible source of citizenship through a legally recognized parent.

b. The implications of the constitutional rule respondent seeks could be far-reaching. If this Court were to find that Congress may not treat the parental

relationship of unwed citizen fathers at the moment of a child's birth differently than the parental relationship of unwed citizen mothers in the context of immigration and naturalization, where Congress has particularly broad discretion, there surely would be a flood of litigation contending that the States must revise their laws—including those governing adoption, inheritance, wrongful death, and residency—that similarly distinguish between those two relationships.

Even today, the father of a child born out of wedlock anywhere in the United States must take some affirmative step to establish his legal status as the child's father.[9] For mothers, parental status is

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[9] See, *e.g.*, Ala. Code § 26-17-304 (LexisNexis 2009); Alaska Stat. § 25.20.050 (2014); Ariz. Rev. Stat. Ann. § 25-812 (Supp. 2015); Ark. Code Ann. § 9-10-120 (2015); Cal. Fam. Code §§ 7573, 7574 (West 2013); Colo. Rev. Stat. § 19-4-105 (2015); Conn. Gen. Stat. Ann. § 45a-604 (West 2014); Conn. Gen. Stat. Ann. § 46b-172 (West Supp. 2016); Del. Code Ann. tit. 13, § 8-201 (Supp. 2014); D.C. Code Ann. § 16-2342.01 (LexisNexis 2001); Fla. Stat. Ann. § 742.10 (West 2016); Ga. Code Ann. § 19-7-46.1 (2015); Haw. Rev. Stat. Ann. § 584-4 (LexisNexis 2015); Idaho Code Ann. § 7-1106 (2010); 750 Ill. Comp. Stat. Ann. § 46/301 (West Supp. 2016); Ind. Code Ann. § 16-37-2-2.1 (LexisNexis Supp. 2016); Iowa Code Ann. § 252A.3A (West Supp. 2016); Kan. Stat. Ann. §§ 65-2409a (Supp. 2015); Ky. Rev. Stat. Ann. § 213.046 (LexisNexis 2015); La. Rev. Stat. Ann. § 9-392 (Supp. 2015); Me. Rev. Stat. tit. 19-A, §§ 1861, 1862 (Supp. 2015); Md. Code Ann., Fam. Law § 5-1028 (LexisNexis 2012); Mass. Ann. Laws ch. 209C, § 11 (LexisNexis 2011); Mich. Comp. Laws Ann. § 722.1003 (West Supp. 2016); Minn. Stat. Ann. § 257.34 (West 2015); Miss. Code Ann. § 93-9-28 (West Supp. 2015); Mo. Ann. Stat. § 193.215 (West Supp. 2016); Mont. Code Ann. § 40-6-105 (West 2015); Neb. Rev. Stat. Ann. § 43-1408.01 (LexisNexis 2016); Nev. Rev. Stat. Ann. § 126.053 (LexisNexis 2010); N.H. Rev. Stat. Ann. § 5-C:24 (LexisNexis 2014); N.H. Rev. Stat. Ann. § 168-A:2 (LexisNexis 2010); N.J. Stat. Ann. § 26:8-28.1 (West 2007); N.M. Stat. Ann. § 24-14-13 (2015); N.Y. Pub. Health

generally established by the act of giving birth. See *Nguyen*, 533 U.S. at 64. The fact that respondent's arguments would call into question the constitutionality of laws in every State of the Union is an additional reason to reject respondent's position.

### D. Congress Chose Appropriate Means To Achieve Its Important Interests

In enacting the challenged laws, Congress faced a complex task: to craft a set of uniform rules that would apply to individuals not located in the United States and that would serve important, but sometimes competing, government interests. Even in the context of considering gender-based equal protection challenges in the domestic context, this Court has never required a perfect fit between means and ends. Flexibility is especially necessary in the context of naturalization, where the rules Congress enacts must operate in combination with the rules of other nations—rules over which Congress has no control and that are likely to change over time. Here, as this Court concluded with respect to another aspect of Section 1409, "[t]he fit between the means [Congress chose] and the im-

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Law § 4135-b (McKinney Supp. 2016); N.C. Gen. Stat. § 130A-101 (2015); N.D. Cent. Code §§ 14-20-11, 14-20-12 (2009); Ohio Rev. Code Ann. § 3111.02 (LexisNexis 2015); Okla. Stat. Ann. tit. 10, § 7700-301 (West 2009); Or. Rev. Stat. § 432.098 (2015); 23 Pa. Cons. Stat. Ann. § 5103 (West 2010); R.I. Gen. Laws § 15-8-3 (2013); S.C. Code Ann. § 63-17-60 (2010); S.D. Codified Laws § 25-8-52 (2013); Tenn. Code Ann. § 68-3-305(b) (2013); Tex. Fam. Code Ann. § 160.301 (West 2014); Tex. Fam. Code Ann. § 160.302 (West Supp. 2016); Utah Code Ann. § 78B-15-301 (LexisNexis 2012); Vt. Stat. Ann. tit. 15, § 307 (2010); Va. Code Ann. § 20-49.1 (2016); Wash. Rev. Code Ann. § 26.26.300 (West 2016); W. Va. Code Ann. § 48-24-106 (LexisNexis 2015); Wis. Stat. Ann. § 767.805 (West Supp. 2015); Wyo. Stat. Ann. §§ 14-2-601, 602 (2015).

portant end[s] is 'exceedingly persuasive.'" *Nguyen*, 533 U.S. at 70 (quoting *United States* v. *Virginia*, 518 U.S. 515, 533 (1996)).

1. The court of appeals erroneously concluded that the government's important interest in reducing statelessness was not sufficient to justify the statutory scheme because, it reasoned, "effective gender-neutral alternatives" were available at the time of the statute's enactment. Pet. App. 32a. The court based that assertion exclusively on a 1933 proposal by then-Secretary of State Cordell Hull that would have amended the nationality laws to provide:

> A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

*Id.* at 33a (quoting Letter from Cordell Hull, Secretary of State, to Samuel Dickstein, Chairman, Comm. on Immigration & Naturalization (Mar. 27, 1933), *reprinted in Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (1933 Hearing)). The court of appeals erred in relying on Secretary Hull's proposed amendment because the amendment, while gender-neutral on its face, would have applied in the same manner as Section 1409(c). It was only when the child was born out of wedlock to a U.S.-citizen mother that the child would have only

one legally recognized parent. That was clear to observers at the time. See 1933 Hearing 56 (testimony of Burnita S. Williams, National Woman's Party) (noting that "[w]hile the State Department has made this to read as though [the Hull proposal] were equal as to men and women, I think they have an idea that it would just apply to women").

For purposes of assessing respondent's equal protection challenge, the salient fact is how the challenged law *operates*, not the words it uses. As this Court explained in *Nguyen*:

> The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference [and in this case, a legal difference] between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.

533 U.S. at 64. The court of appeals therefore erred in relying on a proposal Congress declined to adopt more than 80 years ago to invalidate a statutory framework that has governed the acquisition of U.S. citizenship in this context since 1940.

During a hearing on Secretary Hull's proposed amendment, moreover, Congress considered an objection (from a member of the National Women's Party) to the amendment based on the fact that it would "require[]" State Department personnel "to know what the law is on the subject of illegitimacy in every country of the world" because "[t]hey would have to

know what the law is on the subject of illegitimacy in order to determine whether or not at the place of birth there was a legal parent, or whether one or the other was a legal parent." 1933 Hearing 56. Such a requirement, the witness testified, "would create an extraordinary situation" in which "we would not know where we were." *Ibid.* As a practical matter, official determinations about the U.S. citizenship of foreign-born children are often made many years after the child's birth, as was the case here. A post-hoc inquiry into the laws and informal interpretations that a foreign nation applied many years earlier could be quite difficult. Such a system also would not have provided notice to an expectant U.S.-citizen parent about the consequences of choosing to have the child born abroad rather than in the United States.

This court acknowledged in *Nguyen* that Congress has leeway in crafting citizenship laws to "enact[] an easily administered scheme," 533 U.S. at 69, instead of requiring more specific inquiries. It is worth noting, moreover, that the provision suggested in 1934 would offer no help to respondent, who has never even suggested that he was stateless at the time of his birth in the Dominican Republic.

2. Respondent protests (Br. in Opp. 14, 18-19) that the means Congress chose to further its important interests are insufficiently tailored to satisfy heightened scrutiny because (1) not every country had a statute providing that the mother of a child born out of wedlock was the child's only legally recognized parent—and therefore the only possible source of citizenship in a *jus sanguinis* country—at the moment of birth, and (2) children born abroad in *jus soli* countries were not at risk of being stateless regardless of

who their parents were. Respondent's objections are misguided.

Respondent correctly notes (Br. in Opp. 15) that the Sandifer article on which Congress relied in 1940 stated that approximately half of the countries the author surveyed "had no specific laws governing the citizenship of non-marital children." But our own Nation's history of naturalization laws before 1940 (see p. 24, *supra*) demonstrates that, even in the absence of a statute specifically addressing that situation, most countries as a practical matter based the citizenship of such a child on that of his mother (when a *jus soli* rule was not applicable) because, in the absence of legitimation, the mother was the child's only legally recognized parent. As explained at pp. 28-31, *supra*, experts and scholars agreed that in most of the world his only legally recognized parent at birth was his mother—and therefore that "it [was] almost everywhere the rule that [such children] belong to the state of which the mother is a subject." *Treatise on International Law* 279; see *Nationality and Statelessness in International Law* 97.

Respondent fares no better with his argument (Br. in Opp. 18-19) that the relevant provisions in Section 1409 are unconstitutional because children born in *jus soli* countries faced no risk of statelessness. As this Court explained in *Nguyen*, "[n]one of [the Court's] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." 533 U.S. at 70. Even under heightened scrutiny, a classification need not be drawn with mathematical precision as long as there is a substantial fit between Congress's objectives and the means

of achieving them. In particular, this Court has recognized that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (citations and internal quotation marks omitted). And when, as here, Congress is attempting to accommodate sometimes-competing interests, it is not possible to craft a solution that perfectly serves all interests. Respondent also ignores the fact that, even though the child born out of wedlock to a U.S.-citizen mother in a *jus soli* country might not have been stateless, Congress could still conclude that the child should be permitted to acquire U.S. citizenship at birth because the only legal tie to a country *through the citizenship of a parent*, who could be expected to foster cultural affinity and allegiance, was to the United States.

3. Finally, as this Court recognized in *Nguyen*, the rules set out in Sections 1401 and 1409 were not (and are not) the exclusive means by which a foreign-born child could become a U.S. citizen. Under Section 322(a) of the INA, 66 Stat. 246, for example, if the foreign-born child of a U.S.-citizen parent did not secure U.S. citizenship at birth because his parent(s) did not satisfy the applicable physical-presence requirement, the citizen parent could petition to naturalize the child if the child was under the age of 18 and was residing permanently in the United States in the custody of the citizen parent, pursuant to a lawful admission for permanent residence. 8 U.S.C. 1433(a) (1958). That option was presumably available to respondent's father when respondent was admitted to the United States as a lawful permanent resident in 1975. And under current law, if the foreign-born child

of one citizen parent does not secure U.S. citizenship at birth because that parent did not have sufficient physical presence in the United States, the child is *automatically* a citizen under 8 U.S.C. 1431(a) if the child moves to the United States before turning 18 and resides in the legal and physical custody of that parent pursuant to a lawful admission for permanent residence.

In addition, a foreign-born child who does not qualify for citizenship at birth pursuant to Sections 1401 and 1409, but nevertheless develops substantial connections to the United States through permanent residence in the United States, may apply to become a naturalized citizen upon reaching age 18 through the standard naturalization procedures. See 8 U.S.C. 1423, 1427, 1445(b). Congress cannot be faulted if petitioner did not seek to take advantage of that process (or if he rendered himself ineligible by engaging in criminal activity, see Pet. App. 46a). *Nguyen*, 533 U.S. at 71 ("This option now may be foreclosed to Nguyen, but any bar is due to the serious nature of his criminal offenses, not to an equal protection denial or to any supposed rigidity or harshness in the citizenship laws.").

## II. THE COURT OF APPEALS EXCEEDED ITS CONSTITUTIONAL AND STATUTORY AUTHORITY BY EXTENDING U.S. CITIZENSHIP TO RESPONDENT

This Court has noted that, when a court sustains an equal protection claim, it "faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Mathews*, 465 U.S. at

738 (citation omitted; brackets in original). This general rule rests on the premise that the appropriate solution to the abridgment of the Constitution's equal protection guarantee is to bring about equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* at 740; see *Miller*, 523 U.S. at 458 (Scalia, J., concurring in the judgment) ("The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision (here, supposedly, the provision governing citizenship of illegitimate children of citizen-mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen-fathers)."). The court of appeals chose to remedy the equal protection violation it perceived by "replacing the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c)." Pet. App. 40a. In other words, the court extended what it viewed as the more favorable treatment to unmarried U.S.-citizen fathers (but not to married U.S.-citizen mothers or fathers). The court erred in choosing that remedy because it flouts congressional intent and exceeds the court's authority with respect to naturalization.

A. If made generally applicable, the court of appeals' choice of remedy—imposed more than 60 years after Section 1409(c) was enacted, 50 years after respondent was born, and 40 years after his father legitimated him—would have the effect of granting U.S. citizenship (from birth) to an untold number of individuals who did not satisfy the statutory criteria set

by Congress and who grew up with no expectation that they were citizens of the United States—and would do so in order to remedy the perceived violation of their *parents'* rights, rather than their own.[10] That result is inconsistent with this Court's cases holding that "the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers." *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."). Indeed, this Court acknowledged in *Nguyen* that "[t]here may well be potential problems with fashioning a remedy" if the Court were to find that the additional requirements applicable to unwed citizen fathers pursuant to Section 1409(a)

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[10] The court of appeals also failed to grasp that its remedy could make it *harder* for some U.S.-citizen fathers of children born out of wedlock to satisfy the conditions necessary for their children to be U.S. citizens at birth under Section 1409. The court focused exclusively on the difference in *length* between the ten- and five-year physical-presence requirements made applicable by 8 U.S.C. 1409(a) and the one-year continuous-physical-presence requirement in Section 1409(c), without acknowledging that the relevant ten and five years need not be continuous. For example, some U.S.-citizen fathers who lived in the United States near the border with Mexico or Canada, and who traveled back and forth, might have been able to satisfy the ten- and five-year physical-presence requirements but not the one-year *continuous*-physical-presence requirement.

violated equal protection. 533 U.S. at 72 (quoting *Miller*, 523 U.S. at 451 (O'Connor, J., concurring in the judgment)) (internal quotation marks omitted); accord *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) ("[T]he Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.").[11]

In this context, any judicially crafted remedy must be carefully tailored to preserve the degree of flexibility necessary for Congress to address the problem, balancing competing interests while exercising its exclusive authority over naturalization. If this Court were to conclude that the existing scheme violates equal protection, it should remedy such a violation by extending, on a prospective basis, the longer physical-presence requirements in Section 1401(a), made applicable through Section 1409(a), to children born out of wedlock to U.S.-citizen mothers. Such a ruling would allow Congress to decide whether or how to extend U.S. citizenship to children born out of wedlock to U.S.-citizen mothers and fathers who do not meet the physical-presence requirements in Sections 1401(a). In contrast, the court of appeals' chosen solution would bestow U.S. citizenship upon untold numbers of persons who have never had any reason to believe they were citizens and may never have developed meaningful ties to the United States, and it would raise questions concerning the status of their children, grandchildren, and other descendants.

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[11] The INA itself reflects the courts' constrained authority. In 8 U.S.C. 1421(d), Congress has specified that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the INA] and not otherwise."

B. The court of appeals also erred insofar as it believed the remedy it imposed was consistent with congressional intent. The court noted that, before 1940, Congress had allowed the foreign-born children of U.S.-citizen fathers (and eventually mothers) to be U.S. citizens from birth if the parent had resided in the United States at any time prior to the birth. Pet. App. 37a-38a. But that was before Congress specifically addressed the distinct issues concerning children born out of wedlock. And the court of appeals in any event took the wrong lesson from the "historical background against which Congress enacted the relevant provisions" in the statutory framework actually challenged here. *Id.* at 37a. The relevant question is what the intent of Congress in 1952 (or 1940, when Congress first expressly addressed the situation of children born out of wedlock) would have been if a court were to hold the provisions unconstitutional. The intent of that Congress was plainly to impose new physical-presence requirements on all U.S.-citizen parents of children born abroad when the other parent was an alien—and indeed to impose ten- and five-year physical-presence requirements even when the parents were *married* when the child was born. It would be fundamentally inconsistent with that statutory scheme for a court instead to require only one year of continuous physical presence for all U.S.-citizen fathers when they were *not* married at the time of the child's birth and might not have legitimated the child until years later, whether by later marriage to the child's alien mother (as occurred in respondent's case) or otherwise. The court of appeals erred in rejecting that clear manifestation of congressional intent merely because

it could not "tell with confidence" whether that change "related to the emergence of the United States as a world power after World War II or an increasing number of children born of mixed-nationality parents, or some other set of factors." *Id.* at 38a. Whatever the explanation, it could not be more clear that Congress intended in 1940 and 1952 to impose substantial physical-presence requirements in order for the children born abroad of one U.S.-citizen parent and one alien parent to acquire U.S. citizenship from birth.

Congress enacted a general rule in Section 1401(a)(7) (applicable to children born out of wedlock through Section 1409(a)) of imposing the longer physical-presence requirement in the case of the great majority of foreign-born children who had a U.S.-citizen parent when the other parent was an alien—married mothers, married fathers, and unmarried fathers who legally established their paternity. The allowance of a shorter (albeit continuous) period in Section 1409(c) applied only in the case of the child born out of wedlock to a U.S.-citizen mother. If forced to choose between the two rules, there is no basis for assuming that Congress would have preferred to let the exception swallow the rule. Since 1940, Congress has always applied to unmarried U.S.-citizen fathers the longer physical-presence requirements applicable to married U.S.-citizen fathers (and mothers). The court of appeals' remedy "convert[s] what is congressional generosity into something unanticipated and obviously undesired by the Congress." *Bellei*, 401 U.S. at 835. Indeed, in crafting the INA in 1952, Congress considered —and declined to adopt—an amendment that would have applied the shorter one-year continuous-physical-

presence requirement in what became Section 1409(c) to all foreign-born children of parents with different nationalities. See S. 2842, 82nd Cong., 2d Sess. § 301(a)(5) (1952). Thus, all relevant indications support the conclusion that, if forced to eliminate the differential treatment, Congress would not have chosen the remedy imposed by the court of appeals.

## CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

1. 8 U.S.C. 1401 (1958) provided:

**Nationals and citizens of United States at birth.**

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe. *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year

prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsec-

tion (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[1] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however*, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

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[1] So in original. Probably should read "United States".

2. 8 U.S.C. 1409 (1958) provided:

**Children born out of wedlock.**

(a) The provisions of paragraphs (3)-(5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 1401(a)(7) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and prior to the effective date of this chapter, as of the date of birth, if the paternity of such child is established before or after the effective date of this chapter and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such

person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

3. The Nationality Act of 1940, ch. 876, Tit. I, §§ 201, 205, 54 Stat. 1138-1140, provides:

SEC. 201. The following shall be nationals and citizens of the United States at birth:

(a) A person born in the United States, and subject to the jurisdiction thereof;

(b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such person;

(d) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who resided in the United

States or one of its outlying possessions prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;

(f) A child of unknown parentage found in the United States, until shown not to have been born in the United States;

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying pos-

sessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

* * * * *

SEC. 205. The provisions of section 201, subsections (c), (d), (e), and (g), and section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of

the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.

4. The Immigration and Nationality Act, ch. 477, Tit. III, §§ 301, 309, 66 Stat. 235-236, 238-239 provides:

SEC. 301. (a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom

is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a child of unknown parentage found in the United States under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such cit-

izen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however*, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

* * * * *

SEC. 309. (a) The provisions of paragraphs (3), (4), (5), and (7) of section 301(a), and of paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

(b) Except as otherwise provided in section 405, the provisions of section 301(a)(7) shall apply to a child born out of wedlock on or after January 13, 1941, and prior to the effective date of this Act, as of the date of birth, if the paternity of such child is established before or after the effective date of this Act and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United State or one of its outlying possessions for a continuous period of one year.

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SEP 26 2016

No. 15-1191

IN THE

# Supreme Court of the United States

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LORETTA E. LYNCH, ATTORNEY GENERAL,

*Petitioner,*

v.

LUIS RAMON MORALES-SANTANA,

*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Whether Sections 301 and 309 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401 and 1409 (1958), violate the Fifth Amendment's guarantee of equal protection by requiring unmarried citizen fathers to satisfy substantially more burdensome physical-presence requirements than unmarried citizen mothers in order to transmit derivative citizenship to their foreign-born children.

2. Whether the court of appeals properly remedied the equal protection violation by extending to unmarried citizen fathers of foreign-born children the same rights available to similarly situated unmarried citizen mothers.

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## INTRODUCTION

The derivative-citizenship provisions of 8 U.S.C. 1401 and 1409 discriminate facially on the basis of gender.[1] A U.S.-citizen *mother* of a child born abroad out of wedlock may transmit U.S. citizenship to the child if she was physically present in the United States for *one continuous year* at any point in her life before the child is born. 8 U.S.C. 1409(c). But a U.S.-citizen *father* of a child born abroad out of wedlock may transmit U.S. citizenship to the child only if he resided in the United States for *ten years* before the child's birth (including five years after the age of 14) and legitimates the child. 8 U.S.C. 1401(a)(7) & 1409(a). The express use of the term "mother" in the statute is not, as the government contends, simply a gender-neutral synonym for "legally recognized parent." Instead, it represents a purposeful favoring of mothers over fathers as caregivers for their children born out of wedlock.

The government fails to provide the "exceedingly persuasive justification" needed to sustain such a gender-discriminatory scheme. Unequal physical-presence requirements for U.S.-citizen mothers and fathers do not, and were not intended to, serve the government's asserted purposes of ensuring that foreign-born children have a connection to the United States or that such children will not be stateless. There is no reason to suppose, for instance, that a U.S.-citizen mother who lived in the United

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[1] Unless otherwise noted, all references to 8 U.S.C. 1401 and 1409 are to the 1958 edition of the United States Code, which codifies the relevant provisions of the Immigration and Nationality Act in effect when respondent was born.

States for a year as an infant would better forge a U.S. connection for her child than a U.S.-citizen father who spent his entire life in the United States but whose nonmarital child was born abroad one day before his nineteenth birthday. Nor does the statutory distinction serve an interest in protecting against statelessness.

The poor fit between the statute's discriminatory physical-presence requirements and their asserted purposes is evidence that these purposes were not Congress's contemporaneous aim. To the contrary, the historical record suggests that Congress's actual purpose instead reflects gender-based stereotypes. The executive branch and Congress presumed that mothers are the "natural guardians" of nonmarital children and thus should enjoy a lower bar to returning to the United States with U.S.-citizen children. Such archaic generalizations cannot sustain the statute.

The court of appeals thus properly invalidated the gender-discriminatory provisions of 8 U.S.C. 1401 and 1409, and also properly remedied the discrimination by extending to U.S.-citizen fathers the same right to transmit citizenship to their nonmarital children born abroad as that enjoyed by U.S.-citizen mothers. The judgment of the court of appeals should be affirmed.

## COUNTERSTATEMENT

1. At-birth citizenship for children born abroad has existed continuously since the First Congress. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103. From 1790 to 1934, consistent with common law notions of coverture, citizenship legislation

concerning children born abroad focused only on fathers with no mention of mothers. Such legislation granted U.S. citizenship to foreign-born children as long as the father had resided in the United States prior to the birth of the child. See *Rogers v. Bellei*, 401 U.S. 815, 823-26 (1971). Under these coverture-inspired laws, a wife's legal and political identity was subsumed into that of her husband, and therefore the statutes did not provide for transmission of citizenship between a U.S.-citizen mother and her foreign-born child.

In 1934, Congress altered the citizenship laws to allow transmission of citizenship to a child born abroad as long as the child's U.S.-citizen parent—mother *or* father—resided in the United States for any period of time before the child's birth. See Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797 (the "1934 Act"). Although the 1934 Act did not refer to the U.S.-citizen parent's marital status, it was understood to apply only to the foreign-born children of married citizen parents. See 78 Cong. Rec. 7357 (1934) ("[This bill] applies to the children of wives and the children of husbands.") (statement of Rep. Jenkins); 39 Op. Att'y Gen. 290, 291 (1939) (recognizing "that the applicable statutory provisions [in the citizenship laws] apply only to legitimate children").

Outside of marriage, a different regime prevailed: courts and government agencies interpreted the statutes to forbid transmission of citizenship to a U.S.-citizen father's nonmarital children. See *Guyer v. Smith*, 22 Md. 239, 246-49 (1864). By contrast, although the citizenship statutes did not permit U.S.-citizen mothers—married or unmarried—to

transmit citizenship to their foreign-born children, the State Department nevertheless routinely granted citizenship to foreign-born children of unmarried U.S.-citizen mothers. See *Report Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments* (1938) ("Proposed Code"), reprinted in *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing on H.R. 6127 Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 431 (1945) (the "1940 Act Hearings"). The disparate treatment of U.S.-citizen mothers and fathers with respect to their nonmarital children reflected the view that a mother was always expected to care for her child but that a father was not responsible for children sired outside of marriage unless he took the affirmative step of legitimation. See *id.* (mothers considered "natural guardians" of nonmarital children and "bound" to care for them).

2. The Nationality Act of 1940, ch. 876, 54 Stat. 1137 (the "1940 Act") restricted the transmission of U.S. citizenship to children born abroad to certain classes of U.S.-citizen parents by imposing residency and other requirements. For married parents, the length of the applicable residency requirement turned on the citizenship status of the spouse: If the spouse was also a U.S. citizen or a U.S. national, any period of U.S. residency by a U.S.-citizen parent before the child's birth was sufficient (even if the other U.S.-citizen or U.S.-national parent had never resided in the United States). 1940 Act §§ 201(c), (d). But if the spouse was an alien, the 1940 Act required ten years of U.S. residency by the U.S.-citizen parent

before the child's birth—at least five of which years had to occur after the age of 16. *Id.* § 201(g).

The 1940 Act imposed a different set of rules for transmitting U.S. citizenship to children born abroad to unmarried couples with only one U.S.-citizen parent. *Id.* § 205. On their face, the rules applicable to *un*married U.S.-citizen parents turned on the gender of the parent. For a U.S.-citizen father to transmit citizenship to his foreign-born nonmarital child, he was required to establish paternity by "legitimation, or adjudication of a competent court" during the child's minority, and to satisfy the age-calibrated ten-year U.S.-residency requirement. *Id.* An unmarried U.S.-citizen mother, in contrast, was permitted to transmit citizenship to her foreign-born child as long as she had resided in the United States for any period of time and at any age before the child's birth. *Id.*

The Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (the "1952 Act") preserved the 1940 Act's basic structure governing the transmission of citizenship to nonmarital children born abroad. The 1952 Act made four changes relevant here: (1) it lowered from 16 to 14 the age after which the U.S.-citizen father was required to be physically present in the United States for five years, *id.* § 309(a); (2) it eliminated the possibility of establishing paternity before a "competent court," *id.* § 309(c); (3) it clarified that a nonmarital foreign-born child who obtains U.S. citizenship from his U.S.-citizen mother does not lose that citizenship upon legitimation by the alien father, *id.*; and (4) it increased the period of time unmarried mothers were required to be physically present in the United States from any period of time to one

continuous year, *id.* These provisions were codified in 8 U.S.C. 1409(a) and (c). Thus, the statute in force when respondent was born allowed a U.S.-citizen father to transmit derivative citizenship to his foreign-born nonmarital child only if the father was physically present in the United States for at least ten years, five of which were after the age of 14, *id.* §§ 1409(a), 1401(a)(7); U.S.-citizen mothers, by contrast, could do so having satisfied only a continuous one-year physical-presence requirement, *id.* § 1409(c).

3. The administrative and legislative history of the 1940 Act illuminates the purpose behind this more favorable treatment of unmarried U.S.-citizen mothers of foreign-born children. That historical record confirms that, in 1940, Congress adopted a Proposed Code prepared by an interdepartmental committee comprised of officials from the Departments of State, Labor, and Justice.[2] The Proposed Code embodied the prevailing belief among executive branch officials—from front-line administrators to those in cabinet positions—that the mother was the foreign-born nonmarital child's "natural guardian." 1940 Act Hearings at 431.[3]

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[2] This Court may consider the interdepartmental committee's rationale for crafting the discriminatory scheme in discerning Congress's purpose in enacting it. See *Califano v. Goldfarb*, 430 U.S. 199, 214-15 (1977) (discerning legislative purpose from, *inter alia*, "[t]he Social Security Board['s] ... report transmitted by the President to Congress"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648-49 (1975) (discerning "purpose behind § 402(g)" of the Social Security Act of 1939 from reports of the "Advisory Council on Social Security").

[3] See also, *e.g.*, *Morales-Santana v. Lynch*, No. 11-1252 (2d Cir.), ECF No. 176, A74 at A79 (Mem. of G. Hackworth,

Executive branch officials often expressed the view that nationality laws and practices should embody this norm and thus "provide against the separation of mothers and nonmarital children." *Morales-Santana v. Lynch*, No. 11-1252 (2d Cir.), ECF No. 176, A81 at A81 (Letter from H. Hull, Comm'r Gen., U.S. Bureau of Immigration, to T.M. Ross, Acting U.S. Comm'r of Immigration, Montreal, Can. (Nov. 8, 1929)).[4] As a scholar of this history has noted, "[m]emo after memo ... reveals U.S. officials' nearly

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Office of the Solicitor, U.S. Dep't of State, to R. Flournoy, Office of the Solicitor, U.S. Dep't of State (Aug. 14, 1928) (assuming that, for the nonmarital child the "mother, [is] its only parent and guardian")); *id.* A62 at A67 (Letter from J. Scanlan to R. Shipley, Chief, Passport Div., U.S. Dep't of State (Mar. 7 1936) ("as a practical matter, it is well known that almost invariably it is the mother who concerns herself with [the nonmarital] child")).

[4] See also, *e.g.*, 39 Op. Att'y Gen. 290, 290-91 (1939) ("I perceive the harshness that would follow" if "foreign-born illegitimate children of American mothers [are not] regarded as American citizens"); *Morales-Santana v. Lynch*, No. 11-1252 (2d Cir.), ECF No. 176, A86 at A87 (Letter from F. Perkins, Sec'y of Labor, to C. Hull, Sec'y of State (Mar. 15, 1939) ("illegitimate children born to American mothers will ... be considered as citizens" in order to permit mothers deported to the United States to return with their illegitimate children)); *id.* A90 at A90 (Letter from I.F. Wixon, Acting Comm'r Gen., U.S. Bureau of Immigration, to T.M. Ross, Acting U.S. Comm'r of Immigration, Montreal, Can. (Sept. 21, 1929) ("It can well be foreseen that much distress and possible criticism would result if enforced separation of mothers and [their illegitimate] children were occasioned")); *id.* A74 at A78-79 (Mem. of G. Hackworth, Office of the Solicitor, U.S. Dep't of State, to R. Flournoy, Office of the Solicitor, U.S. Dep't of State (Aug. 14, 1928) (to "deny [a foreign-born nonmarital child] admission to the United States along with its mother, its only parent and guardian" would not be "humane")).

uniform view that it was only practical to keep mothers and their non-marital children together, as mothers were the presumed caretakers of such children." Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2202-03 (2014).

The gender-discriminatory physical-presence requirements ultimately enacted in 1940 reflected this view of the "natural," proper, gender-differentiated roles of mothers and fathers. As John Scanlan, a State Department official and member of the interdepartmental committee that drafted the Proposed Code, see *id.* at 2189 n.221, explained in 1936:

> The rule [that an illegitimate child was *nullius filius*] ... has been ameliorated to some extent in modern times but such amelioration as has occurred has tended to give greater rights over the child to the mother as its natural guardian and, of course, as a practical matter, it is well known that almost invariably it is the mother who concerns herself with the child. *For this reason Section 204 as drawn up by the Committee slightly discriminates in favor of women* but the circumstances in such a case to [*sic*] require it to do so.

*Morales-Santana v. Lynch*, No. 11-1252 (2d Cir.), ECF No. 176, A62 at A67 (Letter from J. Scanlan to

R. Shipley, Chief, Passport Div., U.S. Dep't of State (Mar. 7, 1936) (emphasis added)).[5]

The interdepartmental committee explained to Congress in comments to the Proposed Code that the disparate treatment was based on the stereotype that a nonmarital child would naturally be raised by the mother, not the father. See 1940 Act Hearings at 431 (in the case of the nonmarital child, the mother "stands in the place of the father" and is "bound to maintain [the child] as its natural guardian"); *id.* ("The mother [is] guardian by nurture ... of her bastard child."). Congress adopted this reasoning in enacting the gender-differentiated scheme in the 1940 Act (enacting Section 204 of the Proposed Code as Section 205 of the 1940 Act), and in re-enacting it in the 1952 Act (as section 309(c)).

The legislative and administrative history of the 1940 and 1952 Acts thus reveals that the lower physical-presence threshold for women was intended to make it easier for mothers than fathers to return to the United States with their foreign-born nonmarital children. This distinction embodied the stereotype that the mother, unlike the father, is the "natural" caretaker of the nonmarital child and should therefore be permitted "to return home [to the United States] with a nonmarital child in tow," free of the stringent physical-presence and other requirements Congress imposed on similarly situated fathers. Collins, 123 YALE L.J. at 2202.

In contrast, the historical record of the 1940 Act provides scant contemporaneous support for the

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[5] Section 204 of the Proposed Code was enacted as Section 205 of the 1940 Act.

government's current contention that the discriminatory physical-presence requirements were designed to mitigate statelessness. To the contrary, "exactly one memo by a U.S. official" out of "many hundreds" reviewed mentioned such a risk. *Id.* at 2205 n.283.

4. Respondent's father was born in the U.S. outlying possession of Puerto Rico on March 19, 1900, and acquired U.S. citizenship pursuant to the Jones Act. See Jones Act of Puerto Rico, ch. 145, 39 Stat. 951 (codified at 8 U.S.C. 1402 (1917)). He was physically present in Puerto Rico until February 27, 1919, just 20 days shy of his nineteenth birthday, when he left for the then-U.S.-occupied Dominican Republic to work for a U.S. company. Pet. App. 6a.

Respondent was born in the Dominican Republic on June 15, 1962. He lived with and was raised by his U.S.-citizen father, whose name appears on respondent's birth records. His parents married in 1970 when he was eight years old, thereby legitimating him, and they moved to the United States when respondent was thirteen. Now 54 years old, respondent has lived in the United States as a permanent resident for more than 40 years.

## SUMMARY OF ARGUMENT

I. Sections 1401 and 1409 facially discriminate on the basis of gender by requiring U.S.-citizen fathers to satisfy more onerous physical-presence requirements than the statutes require of U.S.-citizen mothers before they may transmit U.S. citizenship to their nonmarital foreign-born children. The statutory scheme thus effects gender discrimination in violation of the equal protection

guarantee implicit in the Fifth Amendment's Due Process Clause.

A. This Court's precedents make clear that such facially discriminatory classifications are reviewed under heightened scrutiny. Contrary to the government's argument, *Fiallo v. Bell*, 430 U.S. 787 (1977), does not require a less exacting standard of review. In *Fiallo*, in light of Congress's plenary power over immigration and naturalization, the Court conducted rational-basis review of claims by aliens seeking "a special immigration preference status by virtue of a relationship to a [U.S.] citizen." *Id.* at 790. *Fiallo* does not support application of rational-basis review here. The statute here discriminates on the basis of gender against a class of U.S. *citizens* (like respondent's father) and harms those (like respondent) who would have had *pre-existing citizenship* at birth absent that gender discrimination.

B. The government fails to satisfy its burden under heightened scrutiny by demonstrating an "exceedingly persuasive justification" for the gender discrimination in Sections 1401 and 1409 that is "genuine, not hypothesized or invented *post hoc*." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Neither of the two rationales asserted by the government justifies the discrimination at issue here. *First*, the discrimination between unmarried U.S.-citizen mothers and fathers of nonmarital foreign-born children does not help ensure a connection between those children and the United States. For example, the lower physical-presence requirement applicable to unmarried U.S.-citizen mothers *reduces*

the likelihood that their foreign-born children will have a strong connection to the United States.

Nor is there any evidence to support the government's argument that Congress used the term "mother" as a proxy for the child's "only legally recognized parent," and sought to treat unmarried U.S.-citizen mothers in the same manner as it treated two married U.S.-citizen parents. The government focuses on the child's purported "legal" relationship with his mother "at the moment of birth." But the nonmarital child's legal relationship with his U.S.-citizen parent "at the moment of birth" is not dispositive, for the statute permits at-birth citizenship to be conferred retroactively upon the legitimation of the child by his unmarried U.S.-citizen father if the father satisfies the physical-presence requirements. Moreover, Section 1409(c) permits the child to obtain U.S. citizenship from his U.S.-citizen mother even if, for example, the mother spent only a year of her life during infancy in the United States before the child was born. Under these circumstances, the discriminatory scheme cannot be justified as serving Congress's interest in ensuring a connection between nonmarital foreign-born children and the United States.

*Second*, the discrimination does not serve an interest in minimizing statelessness. Congress itself increased any risk of statelessness by imposing the physical-presence requirements in the first place. For example, Sections 1401 and 1409 create a significant risk that nonmarital children born abroad to a U.S.-citizen father who was under the age of 19 when the child was born will be stateless if the law of his country of birth assigned the child his father's

nationality (either at birth or upon legitimation or acknowledgment). The government does not explain why Congress would have exacerbated the risk of statelessness among nonmarital children born abroad to U.S.-citizen fathers if its goal was in fact to reduce the incidence of statelessness. Moreover, the historical record refutes the government's assertion that unmarried mothers faced a greater risk than fathers of having stateless children and shows that Congress did not consider any such risk when enacting the discriminatory scheme.

In light of this poor fit between the gender-discriminatory physical-presence requirements and the government's asserted interests, the most plausible inference is that the discrimination is based on archaic and overbroad gender stereotypes. The historical record confirms as much. Numerous contemporaneous sources show that the interdepartmental committee that drafted Sections 1401 and 1409 viewed mothers as the "natural guardians" of nonmarital children and therefore discriminated in favor of unmarried U.S.-citizen mothers to allow them to return to the United States with their nonmarital children recognized as U.S. citizens.

C. If heightened scrutiny does not apply, the gender-discriminatory provisions of Sections 1401 and 1409 nonetheless fail rational-basis review.

II. The appropriate remedy for the constitutional defect is to extend the more favorable treatment historically enjoyed by unmarried U.S.-citizen mothers to similarly situated unmarried U.S.-citizen fathers who legitimate their foreign-born children.

Contrary to the government's argument, such a judicial remedy does not "confer" citizenship upon respondent; it merely removes a constitutional defect in the statute in the manner most consistent with congressional intent. The historical record demonstrates that the purpose of Section 1409(c) was to prevent the separation of U.S.-citizen mothers from their foreign-born nonmarital children when the mothers returned to the United States. Extension of the less onerous physical-presence requirement to similarly situated U.S.-citizen fathers serves the same interest and also serves the government's asserted interest in reducing statelessness.

In contrast, the inequality here cannot be cured by applying the more onerous physical-presence requirements to U.S.-citizen mothers. The government acknowledges that citizenship previously conferred on the nonmarital children of U.S.-citizen mothers who satisfied the one-year physical-presence requirement cannot now be stripped away. Nor can withdrawing the statutory preference for mothers prospectively correct the discriminatory harm to fathers like respondent's; they would be treated as the perpetual unequals of similarly situated mothers who were able to confer citizenship on their foreign-born nonmarital children under the earlier statutory scheme. Withdrawal of the preference, unlike its extension, also would be contrary to congressional intent under the government's own argument that Congress prioritized an interest in avoiding statelessness over an interest in ensuring a connection between a foreign-born children and the United States.

III. If the Court determines that there is no equal protection violation, or that withdrawal of the benefit in Section 1409(c) is the appropriate remedy, it should nevertheless affirm, on either of two alternative statutory grounds, the court of appeals' judgment that respondent is a U.S. citizen. Respondent's father was deemed not to satisfy the age-calibrated ten-year physical-presence requirement of 8 U.S.C. 1401(a)(7) only because he spent 20 days in the Dominican Republic immediately before he turned 19. The statute should be interpreted to treat that period as *de minimis*, and in any event, to deem the Dominican Republic a U.S. outlying possession at that time.

## ARGUMENT

### I. THE GENDER-BASED DISTINCTION DRAWN BY 8 U.S.C. 1401 AND 1409 VIOLATES THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION

The court of appeals correctly held that the discriminatory derivative-citizenship provisions of 8 U.S.C. 1401 and 1409 effect unconstitutional gender discrimination in violation of the Fifth Amendment's Due Process Clause, and that the proper remedy is a determination that respondent obtained U.S. citizenship at birth. Pet. App. 3a-41a & Opp. App. 1. This Court should affirm that decision.

#### A. The Gender-Based Distinction At Issue Is Properly Reviewed Under Heightened Scrutiny

Discrimination based on gender may not be sustained without "'exceedingly persuasive

justification.'" *Virginia*, 518 U.S. at 524 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). "'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *Id.* at 555 (quoting *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127, 136 (1994)); see also, *e.g.*, *Miss. Univ. for Women*, 458 U.S. at 724; *Craig v. Boren*, 429 U.S. 190, 197-98 (1976). Under such scrutiny, the government must show that a gender-discriminatory classification "serves important governmental objectives" and that the "discriminatory means employed" are "substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533 (quotation marks omitted). Further, the justification must be "genuine, not hypothesized or invented *post hoc*," and cannot "rely on overbroad generalizations" about supposed differences between males and females. *Id.*

As the government does not dispute (see Br. 10, 28), Sections 1401 and 1409 together set forth an expressly gender-based scheme for the parental transmission of derivative citizenship, applying different physical-presence requirements depending on whether the U.S.-citizen parent of a foreign-born nonmarital child is the "mother" or the "father." The statutory scheme thus "imposes a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother." *Nguyen v. INS*, 533 U.S. 53, 60 (2001).

The government nonetheless argues (Br. 13-18) that rational-basis review applies in light of the government's supposed "plenary authority to decide

which persons born abroad should be granted U.S. citizenship" (Br. 14). That argument is incorrect.

1. The government misplaces reliance (Br. 16-17) on *Fiallo*, 430 U.S. 787, which applied deferential review to claims by noncitizens who filed applications for "a special immigration preference status by virtue of a relationship to a [U.S.] citizen or resident alien child or parent," *id.* at 790. As *Fiallo* noted, plenary congressional power over the admission of "aliens" might well "'be unacceptable if applied to citizens.'" *Id.* at 792 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)).[6] This is such a case. Here, unlike the petitioners in *Fiallo*, respondent asserts the right of his father, *a U.S. citizen*, to be free of discrimination on the basis of gender. Moreover, again unlike the petitioners in *Fiallo*, respondent does not claim entitlement to any new immigration status, but instead claims *preexisting citizenship* at birth and thus "contest[s] the Government's refusal to register and treat [him] as a

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[6] The government tries to sidestep this distinction by arguing (Br. 17) that the plaintiffs in *Fiallo* included U.S. citizens yet rational-basis review still applied. But while *Fiallo* recognized that U.S. citizens had "an interest" in their alien relatives' admission into the country, their own equal protection rights were not at stake. 430 U.S. at 795 n.6. Here, by contrast, the issue is not the status of an admitted alien or the interest of a U.S. citizen in an alien relative's admission, but rather the interest of a U.S. citizen himself in conferring U.S. citizenship upon his child, and the existence *vel non* of that child's U.S. citizenship. In any event, the standard of review applied in *Fiallo* must be considered in light of subsequent "pathmarking decisions" recognizing that *all* "gender-based government action[s]" are subject to heightened scrutiny. *Virginia*, 518 U.S. at 531 (citing *J.E.B.*, 511 U.S. at 136-37 & n.6; *Miss. Univ. for Women*, 458 U.S. at 724).

citizen." *Miller v. Albright*, 523 U.S. 420, 432 (1998) (Stevens, J.). As the dissent in *Nguyen* correctly noted, "[b]ecause §§ 1401 and 1409 govern the conferral of citizenship at birth, and not the admission of aliens, the ordinary standards of equal protection review apply." *Nguyen*, 533 U.S. at 96-97 (O'Connor, J., dissenting); see also *Miller*, 523 U.S. at 480-81 (Breyer, J., dissenting).

The government offers no support for its blanket assertion (Br. 17) that the power to grant or deny derivative citizenship "is just as subject to the plenary authority of Congress as the power to admit or exclude aliens." Congress surely could not assert the "plenary power" to enact facially race-discriminatory provisions allowing only white U.S. citizens to confer derivative citizenship on foreign-born children. Nor could Congress enact a law allowing only fathers to confer derivative citizenship on foreign-born children. See *Kerry v. Din*, 135 S. Ct. 2128, 2136 (2015) ("Modern equal-protection doctrine casts substantial doubt on the permissibility of [] asymmetric treatment of women citizens in the immigration context, and modern moral judgment rejects the premises of such a legal order.").

Similarly, the government's assertions (Br. 14-15) that the naturalization power is "quintessentially legislative" cannot defeat the need for the appropriate level of equal-protection review. Assessing "whether Congress has chosen a constitutionally permissible means of implementing" its "plenary authority ... over aliens" is a quintessentially *judicial* task. *INS v. Chadha*, 462 U.S. 919, 940-41 (1983); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Ng Fung Ho v. White*, 259 U.S.

276, 284-85 (1922) ("To deport one who ... claims to be a citizen obviously deprives him of liberty.... Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.").

2. The government fares no better in characterizing respondent (Br. 15-16) as an "alien" subject to the plenary power of the political branches that operates at the Nation's borders. Respondent claims to have acquired U.S. citizenship "at birth," 8 U.S.C. 1409(c), and thus "the question to be decided" is whether he is an alien or a citizen, *Miller*, 523 U.S. at 433 n.10 (Stevens, J.); see also *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting). The government may not assume the conclusion to that inquiry in setting the standard of review. The proper standard here is heightened scrutiny.

### B. The Gender-Based Distinction At Issue Does Not Substantially Serve Any Important Gender-Neutral Purpose

Contrary to the government's argument, the facially gender-discriminatory scheme set forth in Sections 1401 and 1409 neither ensures a connection between a foreign-born nonmarital child and the United States nor redresses a risk of statelessness experienced by a particular class of nonmarital children. That the statute so poorly fits these purported goals helps underscore its actual roots in archaic and overbroad gender stereotypes, as documented in the contemporaneous historical record.

### 1. Discrimination Between Unmarried Mothers And Fathers Of Foreign-Born Children Does Not Help Ensure Connection To The United States

While the government may well have an interest in ensuring that foreign-born children who become U.S. citizens have an adequate connection to the United States, there is no evidence that Congress enacted the gender-discriminatory physical-presence requirements of Sections 1401 and 1409 to serve this purpose. Nor does discriminating between unmarried mothers and fathers advance such a purpose in practice. To the contrary, discriminating in favor of U.S.-citizen mothers *reduces* the likelihood that the foreign-born children of such mothers will have a strong connection to the United States, while discouraging parental ties by U.S.-citizen fathers with strong U.S. connections.

**a.** At the outset, the Court should reject the government's contention (Br. 28) that the expressly "gendered terms" of Section 1409 may be re-characterized as gender-neutral in relation to the U.S.-connection interest. The government suggests (Br. 9-10, 28) that the term "mother" is merely a proxy for "legally recognized parent," and that Congress reasonably could have treated the foreign-born child of an unmarried U.S.-citizen mother "in a manner similar to a child with two legally recognized U.S.-citizen parents" on the theory that, in both scenarios, there is no "competing national influence" from an alien parent. This argument assumes that, in the case of the nonmarital child born abroad to a

U.S.-citizen mother, the child's alien father will not legitimate the child or otherwise play a role in the child's life that might create the "competing national influence" that the government asserts triggers the heightened physical-presence requirements. This assumption plainly is not a permissible basis for gender discrimination. See *J.E.B.*, 511 U.S. at 140 n.11 ("Even if a measure of truth can be found in some of the gender stereotypes used to justify [the practice at issue], that fact alone cannot support discrimination on the basis of gender.").

Moreover, it does not appear that Congress made any such assumption: as the government later acknowledges (Br. 39 n.8), Section 1409(c) "made clear that a child born out of wedlock abroad to a U.S.-citizen mother would not be divested of his U.S. citizenship if his father legally established paternity through legitimation." Congress permitted unmarried U.S.-citizen mothers to transmit citizenship to their foreign-born children by satisfying the one-year physical-presence requirement, even if, on the day of the child's birth, the alien father legitimated the child. Thus, the government's contention (Br. 10) that Congress treated a child born abroad to a U.S.-citizen mother "in a manner similar to a child with two legally recognized U.S.-citizen parents" is wrong and, in any event, does not explain the statute's discrimination between unmarried citizen mothers and fathers.

The government's repeated focus (Br. 28, 31, 45) on the "legal" status of the child's parents "at the moment of birth" is also misplaced. Section 1409(a) allows an unmarried U.S.-citizen father who satisfies the physical-presence requirements and—*after* his

child is born abroad—legitimates the child to transmit citizenship to the child *nunc pro tunc* "at birth." The constitutionality of the scheme therefore must be assessed not "at the moment of birth" as the government suggests (Br. 28), but rather when the child (or his U.S.-citizen parent, on the child's behalf) seeks recognition of U.S. citizenship. At that moment, by virtue of Section 1409(a), the foreign-born nonmarital child of an alien mother and a U.S.-citizen father who legitimated is *identically situated* to the foreign-born nonmarital child of a U.S.-citizen mother and an alien father who legitimated. The only difference is that the statutes impose an age-calibrated ten-year physical-presence requirement on the U.S.-citizen father and a one-year continuous physical-presence requirement on the U.S.-citizen mother.

Thus, contrary to the government's argument (Br. 9), "which rule applies" *does* depend solely "on the *gender* of the U.S. citizen parent" (emphasis added). If the nonmarital child's U.S.-citizen parent is the mother, the one-year physical-presence requirement always applies. If the U.S.-citizen parent is the father, the age-calibrated ten-year requirement always applies, even where both are "legally recognized parents"—or where *only* the father is. See *infra*, 35-37.

**b.** The government also fails to show that Congress's actual purpose in enacting Section 1409(c)'s lower physical-presence requirement for unmarried mothers was to ensure a U.S. connection for the nonmarital foreign-born child. The government contends (Br. 28) that Congress had such an interest because it determined that such

mothers were treated "throughout the world" as the "only legal parent[s]" of their nonmarital children. But even though government officials sometimes referred to the mother as the nonmarital child's "legal parent," that reference was not based on a "comprehensive study of foreign citizenship laws," as the government contends (Br. 29), and cannot negate other expressions of the archaic generalization that a mother is "bound to care for" her nonmarital child, 1940 Act Hearings at 431.

To begin with, the primary source upon which the government relies (Br. 29-30)—Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 AM. J. INT'L L. 248 (1935)—does not support the government's argument. Sandifer's article was not commissioned by Congress or a government agency. There is no evidence that the article was presented to or relied on by Congress, although the interdepartmental committee that drafted the Proposed Code briefly cited the article for a different proposition in the explanatory comments to Section 205. And contrary to the government's description (Br. 29), the article was not a "comprehensive study of foreign citizenship laws, undertaken by an Assistant to the Legal Adviser in the Department of State." Sandifer noted that he conducted his study at the suggestion of "a colleague," not as official State Department business. *Id.* at 248 n.*. And Sandifer expressly cautioned that the study "does not ... purport to furnish a complete picture of the laws of any given country with respect to the subjects included." *Id.* at 249.

Moreover, Sandifer's study is limited to an analysis of "only [] statutory provisions on nationality," and in particular, foreign statutory provisions governing *jus soli* and *jus sanguinis* citizenship. *Id.* at 249. [7] Contrary to the government's suggestion, the article says nothing regarding the separate issue of whether unmarried mothers are the only "legally recognized parents" of nonmarital children at birth in most nations. Sandifer's article does not survey foreign laws regarding the custody and care of nonmarital children or any other family laws that are more likely than nationality laws to affect a nonmarital child's connection to his parents and relative allegiance to the United States *vis-à-vis* the country of his birth. And Sandifer nowhere uses the government's term "legally recognized parent." Thus, the Sandifer article offers no support for the government's argument (Br. 29) that, "[w]hen Congress overhauled the Nation's nationality laws in 1940, it understood that the mother of a child born out of wedlock is typically the only legally recognized parent at the time of the child's birth."[8]

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[7] Sandifer acknowledged that, "[n]eedless to say, in many foreign countries statutory gaps have been filled in by judicial decisions and by administrative regulations and interpretations, just as they have been to some extent in the United States." 29 AM. J. INT'L L. at 249. Sandifer's study does not analyze the judicial decisions or administrative regulations affecting nationality.

[8] In any event, the "typical," "general," or "majority" practice in other nations with regard to a parental "legal relationship" cannot provide a legitimate justification for gender discrimination. Empirical evidence often comports with gender stereotypes, but cannot justify their legal embodiment.

The government fails to bolster its argument by asserting (Br. 22-23) that "Congress also was reluctant to create dual citizens except in rare cases." The government does not explain how the discriminatory provisions at issue here are substantially related to any interest in preventing a foreign-born child from obtaining dual citizenship. Section 1409(c) provides that a nonmarital child born abroad to a U.S.-citizen mother and an alien father obtains U.S. citizenship "at birth" even if that child is born in a *jus soli* country and thus also obtains the citizenship of his country of birth, and even if the child is born in a *jus sanguinis* country that assigns the child his father's citizenship upon legitimation and the father legitimates the child. The government fails to explain why Congress would want to prevent dual citizenship only among the children of unmarried U.S.-citizen fathers, but tolerate it among the children of unmarried U.S.-citizen mothers.

Nor does the government provide any other evidence to show that Congress treated a foreign-born nonmarital child's "legal" relationship with his parents "at the moment of birth" as a suitable proxy for the child's "connection" and "allegiance" to the United States. Any such relationship is implausible,

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See *J.E.B.*, 511 U.S. at 140 n.11 ("Even if a measure of truth can be found in some of the gender stereotypes used to justify [the practice at issue], that fact alone cannot support discrimination on the basis of gender."). Cf. *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968) ("To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.").

as a foreign-born child's U.S. connection and allegiance is logically the result of the child's experience *after* birth. Such connection and allegiance are unlikely to be affected by the child's "legal" relationship—or lack thereof—with his mother or father at the moment of birth.[9]

To be sure, the Court held in *Nguyen* that evidence of a "legal relationship" between a U.S.-citizen father and his foreign-born child is a reasonable means of demonstrating a *biological* connection between them. 533 U.S. at 63, 71. The Court explained that Congress could, consistent with equal protection, require fathers (and not mothers) to satisfy the requirement in Section 1409(a)(4)—of the current version of the statute—that an unmarried father acknowledge paternity in writing under oath before citizenship may be transmitted to his foreign-born child, reasoning that "[f]athers and mothers are not similarly situated with respect to the *proof of biological parenthood*." *Id.* at 63 (emphasis added). Because a father "might not even know of

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[9] A simple example demonstrates the point: Child A is born in Germany and raised there by his U.S.-citizen mother who spent only a year of her life in the United States during infancy; Child B is born in Germany and is legitimated and raised in Germany by a U.S.-citizen father who spent his entire life in the United States before leaving for Germany one week before his nineteenth birthday. Notwithstanding the fact that Child A's "legal relationship" with his U.S.-citizen mother may have been established "at the moment of birth," and Child B's "legal relationship" with his U.S.-citizen father may have been established a few hours later, Child B is more likely than Child A to learn English and assimilate U.S. values. Nevertheless, under the discriminatory scheme, only Child A obtains U.S. citizenship at birth.

conception," and is not required to "be present at birth" as a matter of biological necessity, the paternal-acknowledgment requirement ensures a biological connection between the father and child and "some opportunity for a tie between citizen father and foreign born child." *Id.* at 66. Unlike the paternal-acknowledgment requirement at issue in *Nguyen*, however, the discriminatory physical-presence requirements at issue here do *not* account for *biological* differences. *Nguyen* thus provides no support for the government's contention that, once a father has legitimated the nonmarital child, U.S.-citizen mothers and fathers "are not similarly situated" with respect to the amount of time they need to have spent in the United States in order to be able to foster a connection between a foreign-born child and the United States.

c. Even if Congress had actually intended the gender-discriminatory physical-presence provisions in Sections 1401 and 1409 to serve the government's interest in ensuring a connection between the foreign-born child and the United States, those provisions fail to substantially serve that interest. To the contrary, the discriminatory provisions are grossly over- and under-inclusive. As the court of appeals correctly observed (Pet. App. 22a), there is no reason to suppose "that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the statute seeks to ensure are passed on to citizen children born abroad."

The discriminatory provisions are over-inclusive with respect to the U.S.-connection interest because they permit an unmarried U.S.-citizen mother to

transmit citizenship to her foreign-born child even if the mother was present in the United States for only one year—and at any age, even if merely during infancy. There is no reason to suppose that such a minimal and non-age-calibrated physical-presence requirement will ensure that such a mother has absorbed U.S. culture and values sufficiently to pass them on to her child. By the same token, the discriminatory provisions are under-inclusive because they preclude a U.S.-citizen father from *ever* transmitting citizenship to his foreign-born child if the child was born before the father turned 21 (under the 1940 Act) or 19 (under the 1952 Act), even where—as here—the father spent almost his entire life in the United States up to his nineteenth birthday.

The discriminatory provisions are also over-inclusive because they permit an unmarried U.S.-citizen mother to transmit citizenship to her foreign-born child even if the alien father legitimated the child on the day of birth and raised the child on his own. In the same sense, the discriminatory provisions are under-inclusive because they preclude a U.S.-citizen father who falls a few days short of satisfying the heightened physical-presence requirements from transmitting citizenship to his foreign-born child even if the father established paternity on the day of the child's birth and raised the child as his own in the United States.[10]

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[10] For example, in *United States v. Flores-Villar*, 497 F. Supp. 2d 1160, (S.D. Cal. 2007), *aff'd*, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 564 U.S. 210 (2011), an unmarried U.S.-citizen father was denied the ability to transmit citizenship to his nonmarital foreign-born child where

Thus, even assuming that Congress intended the discriminatory scheme to serve any interest in ensuring a connection between the foreign-born child and the United States, the means it chose do not substantially serve that interest. Looking solely to the gender of the U.S.-citizen parent is, at best, a crude proxy: it permits the transmission of citizenship to children who have no connection with the United States so long as their mother was a U.S. citizen who was physically present in the United States for one year at some point in her life before the child's birth. At the same time it precludes the transmission of citizenship to children who are legitimated and raised from birth by their U.S.-citizen fathers and brought to the United States at a young age and therefore likely to have a significant connection to the United States.

Thus, here as in many of the Court's prior cases, the gender-discriminatory scheme lacks the close means-ends fit required to satisfy heightened scrutiny. See, *e.g.*, *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 151-52 (1980) (invalidating state workers' compensation death-benefits scheme presuming widows but not widowers dependent on their spouse's earnings); *Califano v. Westcott*, 443 U.S. 76, 88 (1979) (invalidating provision of federal aid-to-families-with-dependent

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the child was born before the father reached the age at which he would first have been eligible to satisfy the physical-presence requirements. See *id.* at 1161 (noting that defendant, who was born in Mexico, "came to the United States" "shortly after" he was born, lived with his father in San Diego, and thereafter "had little contact with his biological mother who continued to live in Mexico").

children program giving benefits to families with unemployed fathers but not unemployed mothers); *Orr v. Orr*, 440 U.S. 268, 282-83 (1979) (invalidating state divorce law requiring only husbands and not wives to pay alimony).

### 2. Discrimination Between Unmarried Mothers And Fathers Of Foreign-Born Children Does Not Reduce The Risk Of Statelessness

The government fares no better in contending (Br. 33-39) that the gender-discriminatory physical-presence requirements in Sections 1401 and 1409 serve an interest in reducing the risk of statelessness for a foreign-born child of a U.S. citizen. There is no evidence that a concern for statelessness played any role in shaping the discriminatory scheme at issue. Moreover, the government ignores that the risk of statelessness arises *because of* Congress's imposition of physical-presence requirements, and that the discriminatory scheme fails to serve its supposed anti-statelessness purpose. For example, it creates a substantial risk of statelessness for nonmarital children born abroad to U.S.-citizen fathers.

a. The government argues that Congress intended to reduce the risk of statelessness—at least for children born abroad to unmarried U.S.-citizen mothers—as a result of their U.S.-citizen mothers' inability to satisfy the physical-presence requirements Congress imposed in the 1940 and 1952 Acts. But the historical record of the 1940 Act does not support the government's assertion (Br. 36) that the risk of statelessness was a "widely

acknowledged" problem. See Collins, 123 YALE L.J. at 2205 n.283.[11] And the government's primary source of evidence for its assertion that the 1952 Act "directly addressed the issue of statelessness"—the 1952 Senate Report, S. Rep. No. 82-1137 (1952)—does not mention or otherwise address the issue of statelessness at all. Nor does the 1952 Senate Report explain the differential in the physical-presence requirements applicable to unmarried mothers and fathers.

***The 1940 Act.*** The government cites just two passages from the hearings on the 1940 Act in support of its assertion that statelessness reduction was an actual rationale for the 1940 Act. Neither passage supports that conclusion.[12]

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[11] After conducting a comprehensive analysis of the historical record of the 1940 Act, Professor Collins concludes that "the archival sources providing the best insight into why administrators initially recognized foreign-born nonmarital children of American mothers as citizens—and why those practices were codified in the Nationality Act of 1940—do not support the contention that concerns about statelessness significantly motivated the initial development of the rule." Collins, 123 YALE L.J. at 2205 n.283. To the contrary, she notes, "in the many hundreds of pre-1940 administrative memos I have read that defend or explain recognition of the nonmarital foreign-born children of American mothers as citizens, I have identified exactly one memo by a U.S. official that mentions the risk of statelessness for the foreign-born nonmarital children of American mothers as a concern." *Id.*

[12] The government misplaces reliance (Br. 29, 34, 35, 46) on other later-published sources that Congress could not have considered in connection with the 1940 Act. See Paul Weis, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (1956); Comm. on Nationality & Statelessness of the Am. Branch of the Int'l Law Ass'n, *Report on Nationality and*

*First*, the government cites (Br. 29) a statement by Richard W. Flournoy, Assistant Legal Adviser to the Department of State, explaining a provision of the proposed revised code applicable to a child born out of wedlock to a U.S.-national mother in the absence of paternal legitimation. 1940 Act Hearings at 62-63. But this provision is not explained or justified by reference to statelessness concerns. *Id.*

*Second*, the government cites (Br. 30, 34) an explanatory comment, 1940 Act Hearings at 431, suggesting that the laws of 29 out of 30 foreign countries provided that a child born to unmarried parents followed the mother's nationality in the absence of any legal action by the father to establish paternity. As the government acknowledges, however, that comment relied upon the Sandifer article, which nowhere mentions statelessness, much less suggests that a child born out of wedlock to a U.S.-citizen mother and alien father in any of the 29 countries would become stateless. Sandifer merely observed that the *jus sanguinis* provisions of those countries' statutes transmitted the mother's citizenship in the absence of legitimation or establishment of paternity by the father. In fact, many of those countries' statutes also contained partial *jus soli* provisions that would bestow citizenship upon a child born within that country under various circumstances. For example, France and Italy provided that a child born on their soil who

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*Statelessness, 1950 Committee Reports of the American Branch of the International Law Association* (1950); Int'l Union for Child Welfare, *Stateless Children: A Comparative Study of National Legislations and Suggested Solutions to the Problem of Statelessness of Children* (1947).

did not otherwise obtain the citizenship of his parents would become a citizen of the country of his birth. Moreover, on the same page cited by the interdepartmental committee and the government, Sandifer states that "[t]he majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality." Sandifer, 29 AM. J. INT'L L. at 259.[13] The interdepartmental committee cited Sandifer to demonstrate that certain provisions of the Proposed Code were consistent with the laws of other countries, not to demonstrate that the Proposed Code sought to remedy a statelessness problem created by other countries' laws.

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[13] The government's pre-1940 sources also fail to support its assumption that nearly all nations automatically pass nationality from mother to child at birth. The language the government quotes (Br. 28-29) from a 1924 treatise by English lawyer William Edward Hall is immediately qualified by a footnote and subsequent sentence identifying countries with a contrary practice. William Edward Hall, A TREATISE ON INTERNATIONAL LAW § 69, at 279 (8th ed. 1924). And the passage cited by the government (Br. 35) from Professor Seckler-Hudson's 1934 work does not say that a nonmarital child's nationality always follows that of the mother. Indeed, Seckler-Hudson notes risks of statelessness to children of U.S.-citizen fathers: "[A] foreign-born illegitimate child of an alien mother and an American father, the father never having resided in the United States, may be stateless if he gains no nationality through his mother or by reason of his place of birth[, or] illegitimate children (especially half-castes born in semi-barbarous countries) of American fathers and native women may be without effective nationality if born in foreign countries which confer no nationality upon the child by reason of his place of birth." Catheryn Seckler-Hudson, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 225 (1934).

***The 1952 Act.*** Nor does the government meet its burden to show that minimizing statelessness was the actual purpose of the 1952 amendments. The 1952 Act largely maintained the same discriminatory physical-presence requirements first enacted in the 1940 Act, with the exception that the 1952 Act made it *more* difficult for unmarried U.S.-citizen mothers to transmit derivative citizenship by imposing on them a new, "continuous" one-year physical-presence requirement. It is difficult to see how the 1952 Congress could have been seeking to *reduce* the risk of statelessness for foreign-born children of unmarried U.S.-citizen mothers by imposing a new continuous one-year-presence rule that made it *harder* for U.S.-citizen mothers to transmit derivative citizenship.

The government's cited sources do not support its assertion (Br. 36) that the revisions in the 1952 Act demonstrate Congress's "specific intent" to reduce the risk of statelessness for a child born out of wedlock abroad to a U.S.-citizen mother. *First*, the passages cited by the government from the 1949 United Nations Study of Statelessness (Br. 36) concern displaced persons and refugees, for whom "statelessness" has nothing to do with citizenship at birth. Additionally, the government offers no reason to suppose that Congress was aware of or relied on the U.N. study in revising the derivative-citizenship statute.

*Second*, the government misplaces reliance (Br. 36) on the 1950 Senate Report, which merely quotes a 1947 resolution that directs the preparation of a report on "displaced persons in Europe," S. Rep. No. 81-1515, at 803 (1950), and nowhere suggests that

such persons faced statelessness as a result of being born in a *jus sanguinis* country to mixed-nationality parents.

*Third*, the government gains no support by citing (Br. 38) the 1952 Senate Report, which addressed the possibility that a foreign-born nonmarital child who obtained U.S. citizenship at birth from his U.S.-citizen mother might be divested of U.S. nationality upon legitimation by the alien father, and clarified that the child's U.S. citizenship was permanent regardless of whether the alien father later legitimated the child. [14] Contrary to the government's argument, the 1952 Senate Report nowhere mentions or discusses a risk of statelessness. Indeed, the children that the amendment was intended to affect likely *were not at risk* of being stateless because if they were divested of U.S. citizenship upon legitimation, their U.S. citizenship would likely have been replaced with the alien-father's citizenship.[15] These children certainly faced no risk of being *born* stateless.

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[14] See *Matter of M—*, 4 I. & N. Dec. 440, 445 (BIA 1951) (rejecting notion that, under Section 205 of the 1940 Act, an alien father's legitimation divested U.S. citizenship).

[15] The only other post-1940 sources cited by the government (Br. 34, 35) concerning its statelessness assertions are (1) Comm. on Nationality & Statelessness of the Am. Branch of the Int'l Law Ass'n, *Report on Nationality and Statelessness, 1950 Committee Reports of the American Branch of the International Law Association* 57 (1950)), and (2) Int'l Union for Child Welfare, *Stateless Children: A Comparative Study of National Legislations and Suggested Solutions to the Problem of Statelessness of Children* 7 (1947). The pages the government cites from these sources do not suggest that unmarried mothers faced a greater risk than unmarried fathers

The government fares no better in suggesting (Br. 33) that the 1940 and 1952 Acts' differential physical-presence requirements merely reflected "*the reality* that children born out of wedlock abroad to a U.S.-citizen mother were at risk of having no citizenship at birth" (emphasis added). This suggestion that exogenous foreign-law considerations necessitated the discriminatory physical-presence requirements is incorrect for two reasons.

*First*, as demonstrated above, the two passages from the 1940 Act Hearings cited by the government do not establish any actual or perceived foreign-law "reality" that nonmarital foreign-born children of U.S.-citizen mothers faced a unique risk of statelessness. The Sandifer article merely observes that the *jus sanguinis* laws of significantly less than half of the 79 countries surveyed favored passage of the mother's citizenship to nonmarital children.

*Second*, the government's argument ignores that, in light of foreign-law norms concerning citizenship transmission, Congress's decision to impose physical-presence requirements *created* a risk of statelessness for foreign-born children of unmarried U.S.-citizen *fathers*. As the government's own sources note, the laws of many non-U.S. jurisdictions generally provided that, when a father legitimates a child, he transmits his citizenship to the child.[16] But if a U.S.-

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of having stateless children. Moreover, the government does not cite any evidence demonstrating that Congress considered these sources.

[16] See, *e.g.*, Sandifer, 29 AM. J. INT'L L. at 259 ("The majority rule with respect to legal recognition or legitimation is that the child takes the father's nationality."); Int'l Union for Child Welfare, *Stateless Children: A Comparative Study of*

citizen father who legitimates a child must also satisfy a *physical-presence* requirement, and cannot do so, his nonmarital child born in a foreign country that follows the general rule will face the risk of statelessness despite legitimation—as a result of Congress's own law. To be sure, Sandifer observed that, in the absence of legitimation, approximately 29 countries assigned the nonmarital child the citizenship of the mother, creating the risk of statelessness if the U.S.-citizen mother could not satisfy her physical-presence requirement. But Congress had no basis to view that statelessness risk as greater than the statelessness risk its physical-presence requirements created for U.S.-citizen *fathers*. The historical record thus demonstrates that the discriminatory scheme was enacted *in spite of*, not because of, its effect on the risk of statelessness.

The risk that the onerous physical-presence requirements for U.S.-citizen fathers will increase rather than reduce the risk of statelessness is especially great under the laws of many countries that do not permit their citizen mothers to assign citizenship to a nonmarital child, making the father the *only* parent who could transmit nationality.[17]

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*National Legislations and Suggested Solutions to the Problem of Statelessness of Children* 7 (1947) (noting that, in exclusive *jus sanguinis* countries "always and in all cases children have the nationality of their parents and, if the parents have different nationalities, the nationality of the father").

[17] In some instances, this is a categorical prohibition, in others it applies where the alien father can be identified, where the alien father acknowledges the child, or where the alien father legitimates the child. See generally A COLLECTION OF

There are or were at least thirty-two such countries. See Brief of *Amici Curiae* Scholars on Statelessness in Support of Petitioner at 9-11, *Flores-Villar v. United States*, No. 09-5801 (U.S. June 24, 2010). The government has previously acknowledged that, where the law of a country does not permit the mother to assign her nationality to a nonmarital child, the government's premise for its statelessness rationale is undermined. See Brief for the United States in Opposition to Petition for a Writ of Certiorari, *Flores-Villar v. United States* at 15, No. 09-5801 (U.S. Dec. 16, 2009); Brief for Respondent United States at 18 n.9, *Nguyen v. INS*, No. 99-2071 (U.S. Dec. 13, 2000) (acknowledging "problem of statelessness in the case of children who lost their mother's foreign citizenship due to legitimation by their United States citizen father").

**b.** Even if Congress had as its actual purpose the reduction of a foreign-born, nonmarital child's statelessness risk, the gender-discriminatory physical-presence requirements do not substantially serve that purpose. They are grossly over- and under-inclusive with respect to that purported interest, and the same interest could readily be served by gender-neutral alternatives.

The gender-discriminatory physical-presence requirements are over-inclusive because their preferential features apply irrespective of whether a child is born abroad in a *jus sanguinis* or *jus soli* regime. While relatively less burdensome physical-presence requirements might reduce the risk of

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NATIONALITY LAWS (Richard W Flournoy, Jr. & Manley O. Hudson eds., 1929).

statelessness for children born to an unmarried U.S.-citizen mother in a *jus sanguinis* country, an unmarried U.S.-citizen mother who gave birth in a foreign *jus soli* country still benefits from reduced physical-presence requirements even though her child faces no risk of statelessness. The discriminatory scheme is also over-inclusive because the less stringent rule for unmarried mothers applies regardless of whether the alien father legitimates the foreign-born nonmarital child. Under the prevailing rule in foreign jurisdictions, see *supra* at 36 & n.17, a father transmits his citizenship to a child upon legitimation, eliminating any danger of statelessness when legitimation occurs. Thus the relaxed physical-presence requirements are unnecessary to prevent statelessness wherever a father affirms paternity.

The gender-based provisions are also vastly under-inclusive because they fail to reduce the risk of statelessness for foreign-born children of unmarried U.S.-citizen *fathers*. To the contrary, by imposing an age-calibrated ten-year physical-presence requirement on unmarried U.S.-citizen fathers, Sections 1401 and 1409 *increase* the risk of statelessness. While most foreign nations would allow a father to transmit his nationality to a child upon legitimation, U.S. law prevents that result for a U.S.-citizen father who did not live in the United States long enough or at the right age to satisfy the discriminatory physical-presence requirements. Congress thus *created* a danger of statelessness that would not have otherwise existed in any jurisdiction where an unmarried alien mother cannot transmit her nationality to the child.

For all these reasons, Sections 1401 and 1409 create a classic example of a gender-discriminatory statute that "produces perverse results" by granting benefits to those who do not need them and foreclosing benefits to those who do. *Orr*, 440 U.S. at 282. Here, the statute relaxes physical-presence requirements even where an unmarried U.S.-citizen mother has a child in a *jus soli* country (where the child is at no risk of statelessness). By contrast, it imposes lengthy (sometimes impossible) physical-presence requirements on an unmarried U.S.-citizen father, including those that legitimate their foreign-born child very soon after the moment after birth. The requirements remain even though such legitimation creates serious risks of statelessness for children born in *jus sanguinis* countries who may not take citizenship from the foreign mother because of the U.S.-citizen father's legitimation, but who also do not qualify for U.S. citizenship because the father does not satisfy the physical-presence requirement.

Moreover, Congress had readily available gender-neutral alternatives to accomplish the asserted interest in reducing statelessness, further underscoring the inadequacy of the means-end fit here under heightened scrutiny. See, *e.g.*, *Wengler*, 446 U.S. at 151-52 (holding that dependency for workers' compensation survivor benefits could be determined by gender-neutral individualized inquiries rather than presuming widows dependent); *Orr*, 440 U.S. at 282-83 (holding that spousal need could be determined by gender-neutral individualized divorce hearings on parties' financial circumstances rather than presuming only wives needy); *Weinberger*, 420 U.S. at 653 (holding that a widows-only social security spousal-survivor's benefit

would have better served its purpose to support a surviving spouse who had childcare responsibilities if it had been gender-neutral). Here, Congress could have relaxed the physical-presence requirements for unmarried mothers and fathers alike, in order to order to address a risk of statelessness, or it could have provided a gender-neutral exception where enforcement of the physical-presence requirements against either parent would render a child stateless.[18]

### 3. The Gender Discrimination At Issue Embodies Archaic And Overbroad Stereotypes

In light of the poor fit between the gender-discriminatory physical-presence requirements in Sections 1401 and 1409 and the government's asserted interests in ensuring a U.S. connection and avoiding statelessness for a foreign-born child, the most plausible inference is that the distinction between unmarried mothers and fathers rests on archaic and overbroad stereotypes reflecting "fixed notions concerning the roles and abilities of males and females." *Miss. Univ. for Women*, 458 U.S. at 725. As the court of appeals correctly held (Pet. App. 31a-32a), the administrative and legislative history shows that Congress's actual purpose in imposing less stringent physical-presence requirements on unmarried mothers was to reflect the gender-based stereotype that mothers, not fathers, are the "natural

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[18] While providing such exceptions might impose administrative cost, the Court has "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classification." *Craig*, 429 U.S. at 197-98.

guardians" and primary caretakers of nonmarital children. Such "fixed notions concerning the roles and abilities of males and females," *Miss. Univ. for Women*, 458 U.S. at 725, cannot sustain the statute.

a. As discussed above, the legislative purpose underlying the discriminatory physical-presence requirements can be discerned from Congress's 1940 adoption of a "Proposed Code" that sought to codify long-standing administrative practice. Under that practice, the government had recognized virtually automatic transmission of citizenship from U.S.-citizen mothers to their nonmarital children born abroad, while imposing burdensome physical-presence, age, and formal legitimation requirements before a U.S.-citizen father could similarly transmit his citizenship. The legislative and administrative history leading up to the 1940 Act is replete with statements that mothers, not fathers, are naturally the caretakers of nonmarital children. See Collins, 123 YALE L.J. at 2202-06 (setting forth extensive archival research cited by the court of appeals at Pet. App. 28a-33a). "[T]he historical record reveals that the pronounced gender asymmetry of the [1940] Nationality Act's treatment of nonmarital foreign-born children of American mothers and fathers was shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child—and the father's lack of such a relationship." *Id.* at 2205. "Memo after memo ... reveals U.S. officials' nearly uniform view that it was only practical to keep mothers and their non-marital children together, as mothers were the presumed caretakers of such children." *Id.* at 2202-03.

For instance, a State Department representative on the interdepartmental committee that proposed the discriminatory treatment of mothers and fathers acknowledged that the Proposed Code was based on a gender stereotype: "it is well known that almost invariably it is the mother who concerns herself with the [nonmarital] child. For this reason [the provision enacted as 1940 Act Section 205] as drawn up by the Committee slightly discriminates in favor of women ...." *Morales-Santana v. Lynch*, No. 11-1252 (2d Cir.), ECF No. 176, A62 at A67 (Letter from J. Scanlan to R. Shipley, Chief, Passport Div., U.S. Dep't of State (Mar. 7, 1936)). The statement of another State Department representative similarly demonstrates that, before the 1940 Act, the Department's policy of recognizing as U.S. citizens the foreign-born children of unmarried U.S.-citizen mothers was based on the view that "the mother has a right to the custody and control of [a nonmarital] child as against the putative father, and is bound to control it as its natural guardian." 1940 Act Hearings at 431 (quotation marks omitted).

The gender-discriminatory physical-presence requirements, reflecting these assumptions, aimed to make it easier for mothers to enter the United States with their nonmarital children based on the stereotypical assumption that the mother is the "natural" caretaker of the nonmarital child and should therefore be permitted "to return home [to the United States] with a nonmarital child in tow." Collins, 123 YALE L.J. at 2202. The interdepartmental committee that drafted the discriminatory scheme determined that such preferential treatment was not necessary for fathers even if they legitimated their nonmarital children,

based on the converse assumption: namely, that fathers are *not* the "natural" caretakers of nonmarital children and therefore do not need the same ability as mothers to return to the United States with their nonmarital children. The differential physical-presence requirement for unmarried mothers and father "is thus paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." *Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting).

The government calls this conclusion "speculation" (Br. 39), remarkably ignoring nearly all of the extensive historical sources discussed above and by the court of appeals. But the legislative and administrative history in fact leaves little doubt that the gender-differential physical-presence requirements in Sections 1401 and 1409 were based on "[t]he stereotypical notion" that "all women, wed or unwed, want their children and by nature are fit custodians; a man's parental devotion, however, does not extend to the offspring of an out-of-wedlock union." Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 11 (1975). "Lump judgments of this kind are impermissible." *Id.* This Court has long rejected the stereotype that "most unmarried fathers are unsuitable and neglectful parents," *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), and the notion that unmarried fathers may be treated unequally from mothers even when they have "manifested a significant paternal interest in the child," *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

b. Faced with the plain language of the statute that on its face distinguishes between unmarried mothers and fathers of foreign-born children, the government attempts to justify the treatment based on the ground that such unmarried mothers and fathers are not similarly situated for purposes of the physical-presence requirement. That effort fails.

The government misplaces reliance (Br. 39-40) on *Nguyen*, which concerned the question of whether a paternal-acknowledgment requirement imposed (in the current version of the statute) on unmarried fathers but not on mothers was substantially related to a legitimate government interest. 533 U.S. at 62. That issue is not present on the record here, for respondent's father legitimated him by marriage, and thus the Court's rationale in *Nguyen* does not apply here. The Court held that the distinction there was justifiable because a father's paternal acknowledgment evidences the existence of a biological parent-child relationship while the act of giving birth obviates the need for similar formal acknowledgment by a mother. *Id.* at 62-63.

In contrast, the physical-presence requirements—which pertain to parental conduct *before* the birth of the child—have no bearing on any interest concerning a parent's biological relationship *with a child*. They concern instead a parent's relationship *with the United States*, which has nothing to do with biology. As the court of appeals correctly determined, "unwed mothers and fathers *are* similarly situated with respect to *how long* they should be present in the United States or an outlying possession prior to the child's birth in order to have assimilated

citizenship-related values to transmit to the child." Pet. App. 24a-25a.

For this reason, the government is incorrect in its overreaching suggestion (Br. 41-42) that recognizing an equal protection violation here would "call into question the constitutionality of laws in every State of the Union" that treat mothers and fathers differently for biological reasons. This Court need not revisit its conclusion in *Nguyen* to determine that the differing physical-presence requirements here violate equal protection.

### C. The Gender Discrimination At Issue Also Fails Rational-Basis Scrutiny

For the reasons discussed above, see *supra* Part I.A, the gender-based classification of Sections 1401 and 1409 are subject to heightened scrutiny. But even if the Court disagrees, the judgment of the court of appeals should be affirmed because the statute fails to satisfy rational-basis review. Here, as with the gender-based estate-administrator preference struck down in *Reed v. Reed*, 404 U.S. 71 (1971), the gender-based preference for mothers over fathers lacks any "rational relationship" to a legitimate state objective. Congress had available the obvious alternative of applying the physical-presence requirements in a gender-neutral manner and addressing its interest in preventing the separation of nonmarital children from their U.S.-citizen parents, or an interest in minimizing statelessness, by including provisions that create exceptions when those interests are at stake. A statelessness exception, for example, would turn on

whether application of the physical-presence requirements rendered the child stateless, rather than the gender of the child's U.S.-citizen parent. Although individualized review might have greater cost, the goal of "accomplish[ing] the elimination of hearings" is "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.* at 76.

As described above, there is no rational basis for concluding that unmarried U.S.-citizen fathers who legitimate their children would be any less likely to confer U.S. values upon their children than would unmarried U.S.-citizen mothers. Nor do gender-based classifications as to duration of pre-birth physical presence in the United States rationally reduce the risk of statelessness; to the contrary, as discussed, they increase that risk.

Further, even if, as the government contends, the discriminatory scheme reflects the "reality" of foreign gender-discriminatory citizenship-transmission laws, that purported "reality" does not justify importing foreign discrimination into U.S. law. Stereotypes and prejudices are often based on reality to some extent, but "'the law cannot, directly or indirectly, give [those stereotypes and prejudices] effect.'" *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (applying rational-basis review) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). Here, where the government does not (and cannot) defend other nations' gender-based citizenship determinations as premised on anything other than stereotypes, those stereotypes may not be "give[n] ... effect," *Palmore*, 466 U.S. at 433, for no reason other than convenience, see *Reed*, 404 U.S. at 76.

## II. THE GENDER DISCRIMINATION AT ISSUE IS PROPERLY REMEDIED BY EXTENDING TO U.S.-CITIZEN FATHERS THE SAME STATUTORY BENEFITS CONGRESS GRANTED U.S.-CITIZEN MOTHERS

The Court should affirm the judgment of the court of appeals not only with respect to its finding that Sections 1401 and 1409 violate the Fifth Amendment's equal protection guarantee, but also with respect to the remedy it granted for that violation: extending to U.S.-citizen fathers who legitimate their nonmarital foreign-born children the same terms for transmitting U.S. citizenship to their children as those enjoyed by U.S.-citizen mothers. See Pet. App. 40a & n.19. Contrary to the government's argument (Br. 49), such a remedy neither exceeds judicial authority nor violates congressional intent. Congress's intent is best served by allowing U.S.-citizen mothers and fathers alike to confer U.S. citizenship on foreign-born nonmarital children if the parent has resided in the United States for a continuous period of one year at any point prior to the child's birth.

### A. The Judicial Branch Has The Power To Remedy The Constitutional Violation

"A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of" the discrimination. *Virginia*, 518 U.S. at 547 (quotation marks and

citation omitted). "In previous cases involving equal protection challenges to under-inclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." *Westcott*, 443 U.S. at 89 (citing cases). Although, "equal treatment ... can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class," *Heckler v. Mathews*, 465 U.S. 728, 740 (1984), only extension of the benefit provides an appropriate remedy here.

The government offers no persuasive reason for withdrawing the one-year physical-presence requirement enjoyed by unmarried U.S.-citizen mothers rather than extending that benefit to fathers. As the court of appeals observed below, the government fails to identify "a single case in which [this] Court has contracted, rather than extended, benefits when curing an equal protection violation through severance." Pet. App. 39a.

To the contrary, the Court has repeatedly upheld remedies for federal statutory equal protection violations that extend a gender-differential benefit to the excluded gender rather than withdraw the preference from the benefitted gender. See, *e.g.*, *Westcott*, 443 U.S. at 89-93 (affirming "simplest and most equitable extension" of AFDC benefit preference to unemployed women rather than nullifying preference for unemployed fathers); *Goldfarb*, 430 U.S. at 216-17 (extending social security survivorship-benefit preference to men on terms previously reserved for women); *Weinberger*, 420 U.S. at 653 (affirming lower court's remedy of

extending to widowers social security survivors' benefits already extended to widows).

The government suggests (Br. 50) that this case differs from such precedents because the judicial branch lacks the capacity to "confer" citizenship, a decision reserved exclusively to the political branches. But the remedy of extending to unmarried fathers the lower physical-presence threshold available to unmarried mothers does not run afoul of such separation-of-powers concerns.

To begin with, respondent does not ask the judiciary to "confer" citizenship on him. "The statute itself grants citizenship automatically, and 'at birth.'" *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). The extension to unmarried U.S.-citizen fathers of the same benefit the statute affords unmarried U.S.-citizen mothers is an exercise of the traditional remedial powers of the courts, which in turn allows "the statute, free of its constitutional defect, [to] operate to determine whether citizenship was transmitted at birth." *Nguyen*, 533 U.S. at 96 (O'Connor, J., dissenting). Curing the statute of its constitutional defect would "confirm [respondent's] pre-existing citizenship rather than grant [him] rights that [he] does not now possess." *Miller*, 523 U.S. at 480 (Breyer, J., dissenting).

Moreover, although the government frames the second Question Presented as "[w]hether the court of appeals erred in conferring U.S. citizenship on respondent, *in the absence of any express statutory authority to do so*" (emphasis added), the government does not discuss or cite the statutory authority on which the court of appeals expressly relied (Pet. App. 9a-10a (citing 8 U.S.C. 1252(b)(5)(A)). Section

1252(b)(5)(A) does not merely authorize the court of appeals to decide respondent's claim to citizenship, it requires the court to do so. See *id.* ("If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court ***shall*** decide the nationality claim.") (emphasis added). The government also fails to acknowledge the long history of courts deciding constitutional claims to derivative citizenship. See, ***e.g.***, ***Ng Fung Ho***, 259 U.S at 285 (petitioners who claimed to be foreign-born children of native-born citizens were "entitled to a judicial determination of their claims that they are citizens of the United States").

In arguing that courts do not have the power to confer citizenship, the government misplaces reliance (Br. 50) on *INS v.* ***Pangilinan***, 486 U.S. 875 (1988). ***Pangilinan*** concerned naturalization pursuant to a statute, and the Court simply held that it could not grant petitions for naturalization filed in the U.S. district court when the statutory requirements had not been met. *Id.* at 883-85.

By contrast, the court of appeals here sought to remedy a constitutional violation. Application of the statutory scheme—with the constitutional defect eliminated—will confirm that respondent has been a citizen since birth. Indeed, if respondent's father had ***not*** been present in the United States for one year prior to respondent's birth, respondent still would not be a U.S. citizen, even after extending the statute's benefits to unmarried fathers. Only because respondent's father met the one-year physical-presence requirement would the statute, as

modified to correct for the equal protection violation, confirm respondent's U.S. citizenship since birth.

Interpreting and applying statutes so as to determine whether someone is a citizen, as here, is a traditional judicial function. See, *e.g.*, *Nguyen*, 533 U.S. at 58-59 (evaluating constitutionality of the statute and noting that numerous courts of appeals had interpreted the statute); see also *Nowak v. United States*, 356 U.S. 660, 661 (1958) (interpreting naturalization statute and reversing decision stripping naturalized citizen of citizenship).

### B. Extension Of Benefits To U.S.-Citizen Fathers Accords With Congressional Intent And This Court's Precedents

The statutory scheme here also evinces a congressional purpose supporting extension of the one-year physical-presence requirement to unmarried fathers. To begin with, the 1952 Act contains a severance clause providing that, "[i]f any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act ... shall not be affected thereby." 1952 Act § 406. The presence of the severability clause supports extension of benefits as opposed to withdrawal. *Westcott*, 443 U.S. at 89-90 ("[A] strong severability clause ... counsels against nullification.").

Moreover, extension is the remedy most consistent with any congressional purpose here. The historical record shows that Congress aimed to prevent the separation of U.S.-citizen mothers from their nonmarital foreign-born children, and

according to the government, also to reduce any risk that those children will be stateless. Allowing unmarried fathers to benefit from the lower physical-presence requirement applicable to unmarried mothers advances both interests. It enables more children to return to the United States as U.S. citizens with their U.S.-citizen parent. Any father who legitimates a foreign-born nonmarital child would have an interest—just like the mother—in avoiding separation from that child if returning to the United States. And any interest in ensuring a sufficient connection to the United States to warrant citizenship is more likely to be satisfied by a father who must meet certain post-birth requirements for legitimation than it is by a mother who is not required to have any role in the child's life in order to transmit U.S. citizenship.

Extending the lower physical-presence requirement to fathers also reduces the number of children exposed to statelessness. As discussed, the stringent physical-presence requirements increase this risk for children born in a *jus sanguinis* country where only an unmarried father can transmit citizenship—but may not be able to do so if his U.S. presence fell short. To level down instead of up, as the government proposes, would undermine any purported interest in avoiding statelessness by elevating the more stringent physical-presence requirement over reduction of statelessness. Indeed, the remedy proposed by the government would mean that a child born to an unmarried U.S.-citizen mother or father who had not yet reached the age of 19 could *never* transmit U.S. citizenship. The government's suggestion that Congress would prefer this result over extending the benefit to unmarried

fathers is inconsistent with its statelessness rationale and unsupported by the statutes' text and history.

In addition to these specific purposes favoring extension of the more lenient rule, Congress has moved generally in the direction of less stringent requirements for derivative citizenship. See 1940 Act § 201(g); *Rogers*, 401 U.S. at 823-26 ("[F]or the most part, each successive statute, as applied to a foreign-born child of one United States parent, moved in a direction of leniency for the child.") (discussing the Act of March 26, 1790, 1 Stat. 103, and successive statutes). Indeed, as of 1986, the physical-presence requirement for unmarried U.S.-citizen fathers under the statutory scheme is five years, two of which must come after age 14. 8 U.S.C. 1401(g). This progression further supports the court of appeals' choice of the extension remedy.

Finally, the government argues (Br. 49-50) that extending the more lenient rule would affect an "untold number of individuals" who did not satisfy the criteria Congress set forth and thus had no expectation of U.S. citizenship. But there is no reason to suppose this "untold" number will be large. Extension will enable more children to claim derivative citizenship only where their U.S.-citizen fathers legitimated them during their minority, ensuring proof of "a biological parent-child relationship," *Nguyen*, 533 U.S. at 62, and lived in the United States for the time period (one continuous year) that Congress deemed minimally necessary to establish a U.S. connection. And, while the government is correct that the extension remedy would affect any "children, grandchildren, and other

descendants" (Br. 51), a withdrawal remedy would ensure the equal and opposite discriminatory effect passed down across generations to children, grandchildren and other descendants of fathers like respondent's.

### C. Withdrawal Of Benefits From U.S.-Citizen Mothers Contradicts Congressional Intent And This Court's Precedents

In advocating (Br. 51) the opposite remedy of withdrawing the one-year physical-presence requirement for unmarried U.S.-citizen mothers of nonmarital foreign-born children, and requiring such mothers instead prospectively to meet the age-calibrated ten-year physical-presence requirement applicable to father, the government ignores both congressional intent and this Court's precedents.

To begin with, this Court's precedents typically require retroactive effect for remedies of constitutional violations. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that a ruling holding racial discrimination unconstitutional under the Fourteenth Amendment must "be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception"). A prospective-only remedy would fail to remedy the violation of respondent's father's right to transmit citizenship to his foreign-born nonmarital child on the same terms that unmarried U.S.-citizen mothers historically have enjoyed.[19]

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[19] The government does not dispute that the equal protection right of respondent's *father*—who indisputably is a

In addition, a prospective-only remedy is not "prospective" in the circumstances here. The statute at issue already has conferred U.S. citizenship on nonmarital children born abroad between 1952 and 1986 to U.S.-citizen mothers who satisfied the one-year continuous physical-presence requirement, whether their citizenship has been officially recognized or not. The only "prospective" effect of the government's proposed remedy as to children already born would be to preclude official recognition of those children's citizenship if their mothers cannot satisfy the age-calibrated ten-year physical-presence requirement. That would be tantamount to taking away already-conferred citizenship, and thus would replace one constitutional violation with another. See, *e.g.*, *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967) (holding that established citizenship may not be taken away).

The government's proposed remedy would also be contrary to congressional intent under the government's own argument. On the government's view, Congress prioritized an interest in avoiding statelessness over a U.S.-citizen father's long-time physical presence in the United States. The government's remedy does the reverse by prioritizing the physical-presence requirement over the avoidance of statelessness. Accordingly, even if the government's theory of congressional intent were correct, eliminating the preference for unmarried mothers would be contrary to Congress's intent.

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U.S. citizen—is at issue here, and, as the court of appeals held, respondent has standing to assert his father's rights. See Pet. App. 14a & n.5.

## III. ALTERNATIVE STATUTORY GROUNDS EXIST FOR RECOGNIZING RESPONDENT'S U.S. CITIZENSHIP

Should the Court decline to affirm on the constitutional grounds reached by the court of appeals, it should nonetheless affirm on either of two alternative statutory grounds. These statutory grounds should be reached in order to avoid the serious constitutional question presented here. See, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 576-77 (2009); *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963)(immigration statute); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

a. To confer derivative citizenship on respondent, 8 U.S.C. 1401(a)(7) required respondent's father to have been physically present, prior to respondent's birth, in the United States or a U.S. outlying possession for ten years, including five years after he turned 14. Respondent's father resided in Puerto Rico for nearly all of his first 19 years, departing for the Dominican Republic only 20 days shy of his nineteenth birthday. This Court may affirm on the alternative ground that the 20 days respondent's father spent outside of Puerto Rico is properly viewed as *de minimis* and not a legal basis for denying respondent statutory citizenship.

This Court has recognized implicit *de minimis* grace periods in immigration statutes where alternative constructions would be excessively harsh. See, *e.g.*, *Fleuti*, 374 U.S. at 458 (even absent express statutory authority, return from day trip to Mexico not deemed "entry" under immigration law based on "policies underlying" statute). Further, absent a

reasonable grace period, it was *impossible* for respondent's father to pass derivative citizenship to respondent—based on nothing more than the fortuitous occurrence of his nineteenth birthday. Cf. *id.* at 456 (Court will "'not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious'" and "'too irrational to square with the statutory scheme'") (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)). Respondent's father satisfied 99.5% of the physical-presence requirement, justifying a construction of that requirement in a reasonable manner that does not implicate constitutional concerns.

**b.** In any event, the Dominican Republic was an "outlying possession" of the United States in 1919, and thus respondent's father satisfied the statutory requirements of Section 1401(a)(7). Under the 1952 Act, "outlying possessions" included American Samoa, Swains Island, and "any other territory which was, in fact and law, an outlying possession of the United States during the period of the citizen parent's physical presence therein." *Matter of V—*, 9 I. & N. Dec. 558, 561 (BIA 1962). The U.S. occupation of the Dominican Republic and plenary control of its government from 1916 to 1924 demonstrate that, in fact and law, the Dominican Republic was an "outlying possession" of the United States in 1919. The United States formally occupied the Dominican Republic on November 29, 1916. See Bruce J. Calder, THE IMPACT OF INTERVENTION: THE DOMINICAN REPUBLIC DURING THE U.S. OCCUPATION OF 1916-1924 17 (1st ed. 1984). The commander of the U.S. Atlantic Fleet cruiser force (and soon-to-be Military Governor of the Republic) issued a Proclamation of

the Military Occupation of Santo Domingo by the United States decreeing that the "Republic of Santo Domingo" was hereby "placed in a state of military occupation" and "made subject to military government and to the exercise of military law applicable to such occupation." *Proclamation of the Military Occupation of Santo Domingo by the United States*, 11 SUPP. AM. J. INT'L L. 94, 95 (1917). In mid-December 1916, U.S. officials declared the Republic's constitution illegal, and on January 2, 1917, they suspended indefinitely the Dominican Congress; the U.S. military then controlled the government. Calder 18-19; see also *Santo Domingo: Its Past and Its Present Condition*, Pamphlet prepared by the Military Government of Santo Domingo 14 (Jan. 1, 1920) ("The United States has conducted ... the administration of the entire [Dominican] government for the past three years."). By 1919, residents were ruled by a U.S. government that established U.S.-style institutions, reforms, taxes and laws. Calder 18-19, 32-90.

Because the Dominican Republic was an "outlying possession" of the United States in fact and law in 1919, respondent's father's twentieth day of residency in the Dominican Republic satisfied Section 1401(a)(7)'s physical-presence requirement for establishing respondent's at-birth U.S. citizenship.

The Court, if it does not affirm on the constitutional grounds set forth above, should affirm on either or both of these alternative statutory grounds.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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No. 15-1191

# In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

*v.*

LUIS RAMON MORALES-SANTANA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

Respondent challenges the constitutionality of a statutory scheme that specifies when a child born abroad with at least one U.S.-citizen parent acquires U.S. citizenship from the moment of his birth. That scheme advances important, but sometimes competing, government interests. First, it ensures that the child, through his U.S.-citizen parent's connection to the United States, has a sufficient connection to the United States to outweigh any competing claims of national allegiance; and second, within that framework, it reduces the risk of statelessness at birth. Respondent dismisses those interests, urging that the statute is simply the product of impermissible gender stereotypes and that this Court should grant him U.S. citizenship. But respondent's arguments largely ignore the text, structure, history, and operation of the relevant statutory provisions, which demonstrate the important interests the statute serves; and respondent

compounds that error by seeking relief that the courts lack authority to provide. This Court should reject respondent's arguments.

## I. THE RULES ESTABLISHED BY 8 U.S.C. 1401 AND 1409 FOR CONFERRAL OF CITIZENSHIP ON CHILDREN BORN ABROAD OUT OF WEDLOCK ARE FULLY CONSISTENT WITH THE CONSTITUTION

### A. Congressional Enactments Governing Immigration And Naturalization Are Subject To Deferential Review

Respondent, like other individuals born outside the United States, is not entitled as a constitutional matter to U.S. citizenship by virtue of his birth. Instead, he may acquire U.S. citizenship only if Congress has so provided in an exercise of its plenary authority "To establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4; see *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). As explained in the government's opening brief (at 13-18), Congress's exercise of that plenary authority is subject to judicial review that is highly deferential. Respondent's arguments to the contrary (Br. 15-19) are unavailing.

Respondent erroneously argues (Br. 17-18) that *Fiallo* v. *Bell*, 430 U.S. 787 (1977), does not supply the proper standard of review because the individuals asserting a violation of their rights in *Fiallo* were aliens while respondent asserts the rights of his U.S.-citizen father. Respondent concedes (Br. 17 n.6) that some of the challengers in *Fiallo* were U.S. citizens, but contends that those individuals did not assert their own equal protection rights. Respondent simply misreads *Fiallo*. At least one of the challengers in *Fiallo* was the U.S.-citizen father of a child born abroad out of wedlock who sought and was denied an immigrant

visa for his son. 430 U.S. at 790 n.3. And the plaintiffs there contended that they were denied "equal protection" by a law that discriminated against "natural fathers and their illegitimate children" based in part on "the sex of the parent." *Id.* at 791 (citation omitted). That claim is materially identical to respondent's.

Respondent also errs in asserting (Br. 18), without support, that Congress's constitutional authority over naturalization (including conferral of citizenship on persons born outside the United States) is less comprehensive than Congress's authority over the admission or exclusion of aliens. Respondent ignores this Court's reaffirmation in *Fiallo* that, "in the exercise of its broad power over *immigration and naturalization*, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" 430 U.S. at 792 (emphasis added) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976)); see also *Nguyen* v. *INS*, 533 U.S. 53, 72-73 (2001) (noting, but finding it unnecessary to address, statements in Court's cases "regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power") (citing *Fiallo*, 430 U.S. at 792 & n.4).

Respondent fares no better by contending (Br. 19) that he should be treated as a U.S. citizen for purposes of determining the proper standard of review rather than as an alien. For purposes of his equal protection claim, it is undisputed that respondent is *not* a citizen pursuant to 8 U.S.C. 1401 and 1409 as enacted by Congress, but rather is an alien.[1] He thus does not

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[1] Unless otherwise noted, all citations to 8 U.S.C. 1401 and 1409 are to the 1958 version of the United States Code.

seek a declaration that the statutory provisions actually enacted bestowed citizenship on him; he instead contends that he *should be* regarded as a citizen from birth *in spite of* the legislation on the books. And in doing so, he does not contend that he has any constitutional rights in seeking to become a citizen of this Nation; he relies on an asserted equal-protection right of his father. As in *Fiallo*, deferential review applies to such a claim.

### B. In Any Event, The Rules Established By Sections 1401 And 1409 Are Substantially Related To Important Government Interests

As the government has established in its opening brief (at 18-32), the scheme embodied in 8 U.S.C. 1401 and 1409 advanced two important government interests. First, it ensured that a child born abroad, through his U.S.-citizen parent's connection to the United States, had a sufficiently strong connection to the United States at birth to outweigh any competing claims of allegiance and to warrant conferral of U.S. citizenship at birth. See *Nguyen*, 533 U.S. at 65, 67-68 (recognizing purpose of Section 1409 to ensure that the child has sufficient ties to the United States). Second, within that framework, it reduced the risk that a child born abroad to a U.S. citizen would be stateless at birth. Respondent's challenges to that showing by the government are without merit.

#### *1. Respondent's congressional-purpose analysis is fatally flawed*

a. i. As this Court explained in *Nguyen*, the Court "ascertain[s] the purpose of a statute by drawing logical conclusions from its text, structure, and operation." 533 U.S. at 67-68. It is plain from the text,

structure, and operation of Sections 1401 and 1409 that Congress required a stronger connection to the United States by the U.S.-citizen parent of a child born abroad when it could be assumed at the time of the child's birth (the relevant point in time for purposes of the statute, see pp. 14-15, *infra*) that the child was likely to be raised with competing national ties and influences than when it was likely that the child would be raised with only American family influences. See Gov't Br. 20-22. Congress thus required a shorter physical connection between a child's U.S.-citizen parent and the United States when the child's legally recognized parents were U.S. citizens. A minimal residence requirement applied under Section 1401(a)(3) when both parents were citizens and were married at the time of the child's birth (and thus were both legally recognized as parents at that time); and a one-year continuous-physical-presence requirement applied under Section 1409(c) when the child was born out of wedlock to a U.S.-citizen mother because she was at that time the child's only legally recognized parent.

Congress's statutory treatment of an unwed U.S.-citizen father confirms this purpose. When such a father took the steps required by Section 1409(a) to legally establish his relationship with his child, the child was then treated for purposes of determining citizenship at birth as if his parents had been married at the time of his birth. Under that general rule, if the mother was also a U.S. citizen, then the minimal residence requirement in Section 1401(a)(3) when there were two U.S.-citizen parents applied. But if the child's mother was an alien, the child then had two parents of *different* nationalities, thereby triggering

the ten- and five-year physical-presence requirements in Section 1401(a)(7) for children with parents of different nationalities.

Congress's purpose to reduce the risk that the child of a U.S. citizen would be born stateless is also apparent on the face of the Immigration and Nationality Act (INA or 1952 Act), 8 U.S.C. 1101 *et seq.* As explained in the government's opening brief (at 37-39), Congress amended the relevant provisions in 1952 to make clear that a child born abroad out of wedlock to a U.S.-citizen mother would be a U.S. citizen from birth (provided the mother satisfied the applicable one-year continuous-physical-presence requirement), regardless of whether his father later legitimated him during his minority. The Nationality Act of 1940 (1940 Act), ch. 876, 54 Stat. 1137, could have been construed either (i) to divest the child of U.S. citizenship if the father was an alien who later legitimated him and the U.S.-citizen mother did not satisfy the ten- and five-year physical-presence requirement for parents of different nationalities, or (ii) to leave undecided the citizenship status of such a child—until either the child's father legally established his paternity or the child reached the age of majority—and therefore to render such a child stateless at least temporarily. The 1952 Act eliminated those possibilities by providing in Section 1409(c) that "[n]othwithstanding" Section 1409(a)—*i.e.*, irrespective of whether the child's father later established a legal relationship to the child—the child would be a U.S. citizen from birth if his mother satisfied the one-year-continuous physical-presence requirement. 8 U.S.C. 1409(c). The Senate Report made that purpose explicit, explaining that the change was meant to "insure[] that the child shall have a na-

tionality at birth." S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952). Respondent complains (Br. 35) that the Report did not use the word "stateless" in explaining its purpose—but a child who has no "nationality at birth" is a child who is stateless at birth.

ii. Respondent errs in attacking (Br. 22-27, 30-38) sources establishing that, in most of the world, the mother of a child born out of wedlock was the only legally recognized parent at the time of the child's birth. Respondent does not contest (see Br. 32) that Congress heard testimony from the Assistant Legal Adviser in the Department of State that, when a child is born out of wedlock, he "only has one legal parent" unless or until his father legitimates him. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Superseded by H.R. 9980 Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 62-63 (printed 1945) (1940 Hearings) (cited at Gov't Br. 29); see also *id.* at 431. Respondent instead asserts that that statement is irrelevant because it did not sufficiently tie that information to a congressional purpose of reducing statelessness. But that statement demonstrates that Congress was made aware in 1940 that applicable legal rules did not generally recognize the father of a child born out of wedlock as a legal parent at the time of the child's birth, and that rule explains why Congress chose the means it did to reduce statelessness while still ensuring that the child would have a sufficient connection to the United States at birth.

Respondent also quibbles (Br. 23-26) with the secondary sources cited by the government (Gov't Br. 28-30) to establish the legal rules applicable to parents of

children born out of wedlock. His primary complaint is that those sources state that, in *jus sanguinis* countries, a child born out of wedlock could acquire citizenship at birth only through his mother—rather than stating that such a child's mother was his only legally recognized parent at birth. But the latter proposition is subsumed in the former because the *reason* such a child could acquire citizenship only through his mother is that his mother was his only legally recognized parent. That point is made explicit in the source respondent criticizes (Br. 24) for not using the phrase "legally recognized parent." That source explains that a child could take his father's citizenship only after the father took "any act legally establishing" his paternity. Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258 (1935) (Sandifer) (cited in 1940 Hearings 431).

b. Respondent does not contest the importance of the two government interests manifested in the text, structure, and history of Sections 1401 and 1409, but he asserts (Br. 22-27, 30-38, 41-46) that Congress's true purpose in enacting the 1940 Act and the INA was to advance archaic stereotypes about the roles of unwed mothers and fathers with respect to their children. Respondent's contentions are deeply flawed.

For example, respondent repeatedly asserts (Br. 2, 4, 6, 8, 9, 13, 43) that Congress relied on impermissible gender-based stereotypes by "presum[ing] that mothers are the 'natural guardians' of nonmarital children and thus should enjoy a lower bar to returning to the United States with U.S.-citizen children." *Id.* at 2. But the term "natural guardian" appears only once in the legislative history of the 1940 Act (and not at all in

the legislative history of the INA), in the document explaining the code proposed by the Executive Branch. See 1940 Hearings 431. The phrase appeared (along with the phrase "guardian by nurture") in the paragraphs explaining why the proposed code applied a different physical-presence rule to the U.S.-citizen mother of a child born abroad out of wedlock "in the absence of legitimation or adjudication establishing the paternity of the child." *Ibid.* In such circumstances, the document explained, the mother alone had, by law, the right to the custody and control of her child. *Ibid.* In explaining that legal principle, the document relied on several secondary sources confirming that, in the absence of legitimation (and, therefore, from the moment of birth until the moment of legitimation, if any), the mother of a child born out of wedlock was that child's only *legally recognized* parent. See 1 James Schouler & Arthur W. Blakemore, *A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations* 740-743 (6th ed. 1921); 2 James Kent, *Commentaries on American Law* 231 (11th ed. 1867); 7 C.J. *Bastards* § 28 (1916) (all cited at 1940 Hearings 431).

To be sure, the explanatory document included quotations from those sources that used antiquated language to describe the circumstance that the mother of a child born out of wedlock was at least initially the child's only legally recognized parent. But nothing in those sources or the explanatory document suggests that any person in the Executive Branch involved in drafting the proposed code believed that, regardless of applicable legal rules, the mother of a child born out of wedlock should have been responsible for her child. And Congress's reliance on a legal rule applicable in

most of the world does not constitute either a condemnation of the fitness of unwed fathers or a presumption that such fathers will play no role in their children's lives; it merely reflects Congress's intent to establish administrable rules, based on legal relationships, governing the U.S. citizenship at birth of children born abroad. See *Nguyen*, 533 U.S. at 69.

By the same token, respondent identifies no evidence that Congress was motivated by stereotypes—rather than by the backdrop of legal rules applicable throughout the world—when it enacted the 1940 Act or the INA. In support of his contention (Br. 42) that Sections 1401 and 1409 were "shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child—and the father's lack of such a relationship," respondent relies on the conclusions of a law professor. See Br. 7-10, 41-46 (citing Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134 (2014)). Respondent does not support those conclusions with even a single statement by any Member of Congress or any congressional committee involved in passage of the 1940 Act or the INA. Instead, drawing on that professor's article, respondent cites (Br. 6-10 & nn.3-4, 42) a few scattered internal memoranda from various parts of the Executive Branch that were for the most part drafted in a context unrelated to the enactment of either the 1940 or 1952 Act. And the quoted portions of the memoranda (Br. 7 nn.3-4) simply reflect the fact that the mother of a child born out of wedlock was the child's only legally recognized parent unless or until his father took steps to establish his parental status.

*2. Because Congress legislated to advance two interests that sometimes competed, it could not simultaneously advance both interests in every application of the statutory scheme*

a. At a number of places in his brief, respondent argues that Congress could not have been serving the two important interests identified by the government because certain applications of the statutory scheme might work against one or the other of those interests. But the interests Congress sought to advance sometimes competed, and it is thus unsurprising and untroubling that the statute did not perfectly advance both interests in every application of the statute.

Respondent argues (Br. 27-28), for example, that ensuring a sufficiently strong connection between a child born abroad and the United States could not have been Congress's purpose because Congress required only one year of continuous presence in the United States as a prerequisite for the child of an unmarried U.S.-citizen mother to acquire U.S. citizenship. As explained above, respondent is wrong because he fails to recognize that such a child would, at the time of birth, have no legally recognized parent who is an alien and who might for that reason create a competing claim of national allegiance. For the same reason, Congress required only a residence of even minimal length by one parent when a child had two legally recognized U.S.-citizen parents—including when the child was born out of wedlock to a U.S.-citizen mother and a U.S.-citizen father later legally established his paternity.

But as the government has explained (Gov't Br. 33-39; pp. 6-7, *supra*), the other reason Congress chose to impose that shorter physical-presence requirement

was to reduce the risk that a child born abroad to a U.S. citizen would be stateless at birth. Respondent does not meaningfully contest that, in most of the world where *jus sanguinis* citizenship laws applied, a child born out of wedlock was able to acquire citizenship at the time of his birth only through his mother. By facilitating the acquisition of citizenship by the child of an unmarried U.S.-citizen mother, Congress reduced the risk that such a child would have no nationality at birth. But by easing the physical-presence prerequisite, Congress required a lesser connection between the U.S.-citizen parent and the United States. That is the nature of enacting a legislative scheme that advances important but sometimes divergent interests.

Respondent similarly contends (Br. 34) that Congress was not attempting to reduce the risk of statelessness because Congress *imposed* the one-year continuous-physical-presence requirement on unwed U.S.-citizen mothers when it enacted the INA in 1952. But that is just the flip side of the coin: any additional requirements Congress imposed in order to ensure a greater connection to the United States would inevitably preclude some children of U.S. citizens from acquiring U.S. citizenship at birth, which would increase the risk that such children would be stateless at birth. This Court should reject respondent's view that, when Congress serves important but sometimes competing interests, it should be viewed as serving no legitimate interest at all. The Court should instead recognize that balancing such interests is a difficult task—and, particularly in the context of conferring U.S. citizenship on individuals born abroad, is a job for Congress.

b. Respondent also argues that Congress was not attempting to reduce statelessness because it did not eliminate the risk of statelessness in all conceivable circumstances. In particular, respondent points out (Br. 36-37) that an unwed U.S.-citizen father who could not satisfy the physical-presence requirements in Section 1401(a)(7) could cause his child to become stateless by legitimating him if his child was born to an alien mother in a *jus sanguinis* country that determined a child's citizenship through his legally recognized father (if he had one). It is true that such a child might have been rendered stateless. But it is also true that a similarly-situated child of a *married* U.S.-citizen father—a class of citizens respondent ignores—who could not satisfy Section 1401(a)(7) would face a similar risk. In both instances, that is a consequence of Congress's purpose to ensure that a child of two legally recognized parents of different nationalities had a sufficient connection to the United States to warrant conferral of citizenship. That the scheme applies with equal consequences to married and unmarried fathers belies respondent's repeated suggestions that the statutory scheme is premised on outdated assumptions about an unwed father's lack of relationship to his child.

Moreover, this Court has made clear that Congress's statutory scheme need not "be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. In particular, this Court has recognized that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (citations omitted).

### 3. *Congress could properly predicate the acquisition of U.S. citizenship at birth on the legal status of a child's parents at the moment of the child's birth*

Respondent argues (Br. 12, 21-22, 25-26) that the government errs by focusing on the legally recognized relationship between a child born abroad and his parents at the moment of the child's birth rather than at some later unfixed date. But the purpose of the scheme embodied in Sections 1401 and 1409 is to determine which children born abroad should acquire U.S. citizenship *at birth*. In devising such a scheme, Congress necessarily focused on the status of such children—including their legal relationships (or lack thereof) with their parents—at birth. Because the father of a child born out of wedlock generally had no legally recognized relationship to the child at the time of the child's birth, Congress had no means of providing for the automatic conferral of U.S. citizenship at birth based on the U.S. citizenship of the father. Congress required such a father to undertake certain steps to legally establish his relationship to his child—requirements that were upheld in modified form in *Nguyen* and were satisfied here when respondent's father later married his mother. But once a father had taken such steps, the statutory scheme treated the child as if his parents had been married at the time of the child's birth—and, if the father satisfied the physical-presence requirements in Section 1401(a)(3) or (7), conferred citizenship on the child "as of the date of birth." 8 U.S.C. 1409(a).

Respondent relies on the unwed father's opportunity to effect conferral of citizenship through an act taken after the birth of his child to argue that the constitutionality of the statutory scheme should be

assessed either at that point or at whatever point in the future the parent or child seeks official documentation of the child's citizenship (see Br. 22). But nothing in the statutory scheme supports such an approach; indeed, the opposite is true. Even when dealing with an action that Congress knew could only take place after the child's birth (*i.e.*, legitimation), Congress made the effect of that action retroactive *to birth*—because the very purpose of Sections 1401 and 1409 was to determine which children born abroad would acquire citizenship *at birth*. See 8 U.S.C. 1401 ("Nationals and citizens of United States at birth."). Congress dealt separately with situations in which a person could acquire U.S. citizenship as of some date later in life. See p. 20, *infra*. Respondent's focus on any number of events that may or may not take place after the birth of a child also ignores Congress's plain intent in 1952 to eliminate ambiguity about whether a child was a U.S. citizen between the time of his birth and some later date. See Gov't Br. 37-39.

Respondent's unwillingness to accept that Sections 1401 and 1409 govern the acquisition of citizenship at birth leads to multiple errors in his and his amici's assessment of the international legal landscape governing the citizenship of children born out of wedlock. Respondent relies (Br. 38) primarily on an amicus brief filed in *Flores-Villar* v. *United States*, 564 U.S. 210 (2011) (per curiam), a brief that has been reproduced in this case. See Scholars on Statelessness Amicus Br. (Statelessness Scholars). Although that brief claims (*id.* at 15-17) to present a survey of other nations' laws governing the citizenship of children born out of wedlock, amici admit (*id.* at 14 n.5) that their analysis is not comprehensive because it relies

exclusively on codified provisions of law without examining case law. See *id.* at 21-22 (acknowledging that, at the relevant time, many countries had no statute governing the nationality of non-marital children). The absence of a statute specifically addressing the citizenship of children born out of wedlock does not indicate that such children either had no citizenship or were treated for citizenship purposes as if their parents were married. On the contrary, as a noted source relied on by the government (Gov't Br. 35) and by amici (Statelessness Scholars 21-22) explained, even in the absence of a statutory provision governing the question, "it [was] almost everywhere the rule that" children born out of wedlock "belong[ed] to the state of which the mother [was] subject" because, at least until paternity was established, the fathers of such children were "necessarily uncertain in law." Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* 217 (1934) (quoting William Edward Hall, *A Treatise on Int'l Law* § 69, at 238 (4th ed. 1895)). And the only secondary source that examined the laws of the countries that did address by statute the citizenship status of children born out of wedlock confirms that, at the relevant time, all but one of those countries provided that such children would take the citizenship of their mothers. Sandifer 258-259 & n.38; see Gov't Br. 29-30.

Respondent and amici also draw misleading conclusions from the data they did analyze. In particular, their assertions (Resp. Br. 37-38; Statelessness Scholars 14) that more than thirty countries did not permit children born out of wedlock to acquire citizenship from their mothers is flatly incorrect when the question is (as Congress determined it was for purposes of

Section 1409) whether a child born out of wedlock could acquire his mother's citizenship *at birth*. Amici's own brief descriptions (Statelessness Scholars 15-17) of the laws they analyzed (some of which do not address the citizenship of children born out of wedlock at all) reveal that nearly all of the laws on which they rely either did not exist when the 1940 and 1952 Acts were enacted (see *id.* at A3-A15) or limited the child's ability to acquire his mother's citizenship *only* after the child's father legally established his paternity (if he ever did). Those laws therefore support the government's argument that, in the absence of legitimation, the child's mother was his only possible source of citizenship through a parent.

## II. THE COURT OF APPEALS EXCEEDED ITS CONSTITUTIONAL AND STATUTORY AUTHORITY BY EXTENDING U.S. CITIZENSHIP TO RESPONDENT

Respondent fares no better in arguing (Br. 48-52) that the court of appeals had authority to rewrite Sections 1401 and 1409 to extend citizenship to respondent and countless other unidentified individuals who were born abroad and have never had any expectation that they are U.S. citizens.

As explained in the government's opening brief (at 48-51), the power to extend citizenship to individuals born abroad is vested exclusively in the Legislative Branch and may not be exercised by courts.[2] Respondent errs in relying (Br. 50-51) on 8 U.S.C.

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[2] Respondent's amici err in relying (Constitutional Law Scholars Amicus Br. 19-21) on this Court's decision in *Wong Kim Ark*, 169 U.S. at 704, which merely eliminated an invalid statutory barrier to the Constitution's positive conferral of citizenship on all persons born within the United States and subject to its jurisdiction.

1252(b)(5)(A), which directs courts to decide nationality claims where such claims do not rely on a disputed issue of material fact. That provision concerns only the application of existing statutory provisions to the facts of particular cases; it does not authorize courts to rewrite those provisions to enlarge the category of individuals born abroad who acquire U.S. citizenship at birth.

There are, moreover, particularly strong reasons here not to relax the bar on courts' granting U.S. citizenship to individuals whom an Act of Congress deems to be aliens, because the remedy adopted by the court of appeals is manifestly contrary to congressional intent. In defending the court of appeals' extension remedy, respondent urges this Court to apply a generally more favorable rule to children born abroad out of wedlock than it applies to children born abroad to married parents. But respondent makes no effort to justify such a distinction; indeed, respondent does not even acknowledge Congress's treatment of the children of married parents. This Court cannot discern congressional intent, however, by simply ignoring the rules that Congress applied to all but one categories of children born abroad who had only one U.S.-citizen parent.

As explained in the government's opening brief (at 4, 10, 25-26), when the father of a child born abroad out of wedlock took the steps necessary to legally establish his paternity, Congress then treated his child exactly the same as if the child's parents had been married at the time of his birth. Thus, *all* legally established parents of children born abroad were subject to the same rules except unmarried mothers. If that exception to the general rule violates the Con-

stitution, the obvious solution is to eliminate the exception.[3]

Respondent protests (Br. 53-54) that under the statutory regime Congress enacted, a child born abroad out of wedlock could never obtain citizenship through a U.S.-citizen father if he was born before the father's nineteenth birthday. But that was also true of children born abroad to married U.S.-citizen fathers *and mothers* when the child's other parent was an alien. Respondent does not contend that applying physical-presence requirements as a prerequisite to acquisition of citizenship is unconstitutional in its own right, even when the result is that acquisition will not be possible in some cases. Indeed, the whole point of imposing such requirements was to prevent the acqui-

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[3] Respondent errs in suggesting (Br. 56) that the government's proposed remedy would withdraw citizenship from children born abroad between 1952 and 1986 who would qualify for citizenship under Section 1409(c). The government proposes (Gov't Br. 51) imposing the longer physical-presence requirement in Section 1401(a)(7) on children born abroad out of wedlock to U.S.-citizen mothers, but only on a prospective basis. The Court must be cognizant of the important reliance interests created by Section 1409(c) for existing U.S. citizens who obtained their citizenship by virtue of having been born abroad to unwed citizen mothers who had been physically present in the United States for a continuous period of one year before the birth (but less than the ten or five years of physical presence required by Section 1401(a)(7)). The Court should therefore not apply that longer physical-presence requirement to such mothers retroactively. *Cf. Heckler* v. *Mathews*, 465 U.S. 728, 745-750 (1984) (upholding Congress's decision to continue for certain individuals a gender-based statutory distinction that this Court had previously found to be a violation of equal protection, in order to protect reasonable reliance interests).

sition of U.S. citizenship at birth in some circumstances.

Moreover, it is untrue (see Resp. Br. 53) that Sections 1401 and 1409 were the only means by which a child born abroad out of wedlock (or to married parents) could acquire U.S. citizenship through a parent. For example, respondent's father could have filed a petition to naturalize respondent before respondent's eighteenth birthday when respondent was residing permanently in the United States with his father pursuant to a lawful admission for permanent residence, 8 U.S.C. 1433 (1958)—an avenue that directly addressed respondent's concern (see Br. 28-29) for the situation in which a child born out of wedlock formed a relationship with his U.S.-citizen father and the United States following birth. In addition, if respondent's mother had become a naturalized U.S. citizen after marrying respondent's father and before respondent's sixteenth birthday, respondent would automatically have acquired U.S. citizenship if he had been residing in the United States pursuant to a lawful admission for permanent residence. 8 U.S.C. 1431 (1958). And of course respondent could have sought naturalization in his own right once he attained the age of majority. 8 U.S.C. 1427, 1445. These various paths to citizenship must be taken into account in considering whether the provisions respondent challenges violate equal protection.

It is true that those avenues to citizenship now may be foreclosed to respondent, but that is because his parents did not take the necessary steps when he was young and because any bar to his naturalization now "is due to the serious nature of his criminal offenses, not to an equal protection denial or to any supposed

rigidity or harshness in the citizenship laws." *Nguyen*, 533 U.S. at 71. Respondent does not suggest that he has ever considered himself to be a U.S. citizen. Nor is there any evidence that he sought to be recognized as a citizen, at least before he faced the prospect of removal from the country after committing serious crimes. This Court should not intrude on Congress's plenary authority over matters of nationality by conferring citizenship on respondent—54 years after he was born and based not on any constitutional right of his own but on a perceived violation of his father's equal protection rights.

## III. UNDER THE EXISTING STATUTORY SCHEME, RESPONDENT DID NOT ACQUIRE U.S. CITIZENSHIP AT BIRTH

Respondent also argues (Br. 57-59), almost in passing, that if this Court agrees with the government that Sections 1401 and 1409 do not violate equal protection, the Court should hold that respondent nevertheless acquired citizenship under those provisions as enacted. The court of appeals correctly rejected those arguments. See Pet. App. 10a-13a.

First, respondent argues (Br. 57-58) that this Court should invent a "grace period" exception to the bright-line physical-presence requirement Congress enacted in Section 1401(a)(7) and should deem his father to have satisfied that (altered) requirement. Respondent offers no guidance on how courts would evaluate the scope of a judicially-fashioned exception. And, as respondent has recognized (Br. in Opp. 27-28), Congress knew how to create grace-period exceptions and chose not to do so in this statute. That should be the end of the matter. Respondent's reliance on *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), is misplaced. The

Court in *Fleuti* construed an *existing* statutory exception to a rule specifying the consequences of a lawful permanent resident's departure from and reentry to the United States. Here, Congress did not include any such exception in Section 1401(a)(7).

Second, respondent argues (Br. 58-59) that his father satisfied the physical-presence requirement in Section 1401(a)(7) because the Dominican Republic was an "outlying possession" of the United States in 1919, when his father moved there at the age of 18. Respondent relies on the United States' military occupation of the Dominican Republic from 1916 to 1924 to support his contention. Although respondent acknowledges (Br. 58) that the term "outlying possessions" in the INA includes only American Samoa, Swains Island, and "any other territory which was, in fact and law, an outlying possession of the United States," see *Matter of V—*, 9 I. & N. Dec. 558, 661 (B.I.A. 1962), he cannot identify any authority that would establish the Dominican Republic's status "in law" as an outlying possession of the United States. Indeed, this Court has held that one nation's occupation and control of another nation's territory does not amount to de jure sovereignty over that nation or its territory. See *Boumediene* v. *Bush*, 553 U.S. 723, 754 (2008) (citing *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 614 (1850); *King* v. *Earl of Crewe ex parte Sekgome*, 2 K.B. 576, 603-604 (C.A. 1910) (Williams, L.J.)).

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
*Acting Solicitor General*

OCTOBER 2016

RECORD AND BRIEFS

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IN THE

# Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
*Petitioner*,

v.

LUIS RAMON MORALES-SANTANA,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR *AMICI CURIAE* CONSTITUTIONAL LAW, FEDERAL COURTS, CITIZENSHIP, AND REMEDIES SCHOLARS IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

Amici, scholars of constitutional law, citizenship, and of the jurisprudence of the federal courts, believe that their expertise would be of use to this Court in considering the scope and proper exercise of the federal courts' remedial authority in cases challenging the constitutionality of gender disparities in citizenship statutes.

A complete list of the Amici joining in this brief is provided in an Appendix at the back of this brief.

## SUMMARY OF ARGUMENT

Three well-established principles outline the proper approach for a federal court to follow when faced with a statute that violates equal protection. First, and centrally, the victim of the wrong is to be placed, to the maximum extent possible, in the position he or she would have occupied but for the wrong. Second, out of respect for legislative decisions and separation of powers, courts remedying unconstitutional disparities in a statute should alter the statute as little as possible. Third, this Court's jurisprudence typically aims to eliminate unconstitutional disparities in the provision of a statutory benefit by extending and applying the specified benefit to the disfavored class rather than by withdrawing it from the favored class.

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[1] Counsel of record for all parties have consented in writing to the filing of this brief.

No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Here, the Second Circuit properly applied this Court's conventional practices when finding a constitutional violation. The fundamental remedial goal of restoring Respondent to his rightful position can only be achieved in this case through extension, not nullification: citizenship cannot be withdrawn from those who have already become citizens pursuant to § 1409(c), even though they are—but for the sex of their American-citizen parent—identically situated to Respondent. Moreover, even prospective nullification of § 1409(c) would frustrate Congress's clear intention to confer citizenship on the children covered by it. Thus, what the Second Circuit did here was to follow established precedent when faced with an unconstitutional aspect of a statute by replacing a gender-specific term with its gender-neutral equivalent.

The finding that Respondent is entitled to citizenship under § 1409(c)—once the unconstitutional gender disparity is removed from the statute—is well within the authority of the courts. Respondent's claim is that, but for an unconstitutional gender classification, he satisfies the statutory criteria for citizenship. It is the responsibility of the federal courts to adjudicate such claims, and—if a statute is found unconstitutional—to determine how the statute can be applied in the way most consistent with the congressional enactment. Indeed, statutory grants of citizenship—and citizenship more generally—are of special concern to this Court, which has repeatedly recognized the citizenship of individuals upon the invalidation of statutes that denied them citizenship.

Thus, this Court ought not depart from its ordinary practice of remedying unconstitutional provisions while leaving statutes intact.

The central issue of gender-based classifications in this case has been before this Court previously, and six Justices have recognized that if § 1409(c) is found unconstitutional, there is no constitutional obstacle to the type of relief sought in this case.

## ARGUMENT

### I. THIS COURT, RESPECTFUL OF THE SEPARATION OF POWERS, ORDINARILY REMEDIES STATUTORY VIOLATIONS OF EQUAL PROTECTION BY KEEPING INTACT AS MUCH OF THE CONGRESSIONAL ENACTMENT AS POSSIBLE.

A holding that a statute violates equal protection raises the question of how federal courts should remedy the constitutional defect while hewing as closely as possible to the congressional scheme. That question is not a novel one. Rather, three well-established principles outline the proper approach. First, the most fundamental principle of remedies is that the victim of a legal wrong is to be placed, as near as may be, in the position he or she would have occupied but for the wrong. Second, out of respect for legislative decisions and separation of powers, this Court strives to implement the provisions of statutes to the maximum extent consistent with remedying the unconstitutional disparity. Third, ordinarily, unconstitutional disparities in the provision of a statutory benefit are eliminated by extending the

benefit to the disfavored class rather than by withdrawing it from the favored class.

The Second Circuit's remedial approach—"[c]onforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection," Pet. App. 41a—adheres to these longstanding principles. The Government's proposed remedy—which would deny citizenship to many on whom Congress expressly conferred it, while at the same time leaving the Equal Protection violation largely unremedied—does not.

### A. Equal Protection Violations Are Remedied By Placing Victims of Discrimination in the Position They Would Have Occupied But For the Violation.

The core principle of the law of remedies—and the ordinary remedy for constitutional violations—is that the victim of a legal wrong is to be restored, to the maximum extent feasible, to the position he or she would have occupied in the absence of the wrong. "With respect to both compensatory and preventive remedies, the goal is to restore or maintain plaintiff's rightful position." Douglas Laycock, *Modern American Remedies* 265 (4th ed. 2010); *see also id.* at 14–15 (defining the rightful position as the "position plaintiff would have been in but for the wrong"); 1 Dan B. Dobbs, *Law of Remedies* § 2.4(7) at 118 (2d ed. 1993) (equitable remedy should "restore the plaintiff to her entitlement, no more, no less").

This principle is particularly clear in equal protection cases. As this Court explained in *United*

*States v. Virginia*, 518 U.S. 515 (1996), "[a] remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'" *Id.* at 547 (third alteration in original) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)); *see also Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (goal is "restoring the victims of discriminatory conduct to the position they would have occupied in the absence of that conduct"); *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 447 (1980) (same). As this Court has interpreted the principle, it means not only that ongoing unconstitutional discrimination must be eliminated, but that the remedy must "'eliminate [so far as possible] the discriminatory effects of the past.'" *Virginia*, 518 U.S. at 547 (alteration in original) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

### B. The Court Should Invalidate As Little Of a Statute As Necessary to Correct the Constitutional Infirmity.

When one aspect of an otherwise valid statute is unconstitutional, this Court has long applied a "presumption of separability." Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 6; *see also, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1333 (2000). This principle that the unconstitutional portion of a statute ordinarily may be excised, leaving the rest of the statute effective, goes back to *Marbury v. Madison*, 5 U.S. (1 Cranch)

137 (1803), which invalidated only a single provision of the Judiciary Act of 1789 while leaving the rest of the statute standing. *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 250 (1994).

The principle reflects both the practice of this Court and the severance clauses frequently provided in statutes. Indeed, the principle was expressly incorporated into the Immigration and Nationality Act of 1952 (Pub. L. No. 82–414, 66 Stat. 163 (1952)) ("1952 Act"), which contains a severance clause that provides: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act . . . shall not be affected thereby." 1952 Act § 406.

In severing the unconstitutional portion of a statute, this Court is careful to avoid "nullify[ing] more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). Indeed, because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality op.), this Court is guided by congressional intent and seeks the narrowest invalidation possible, "enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in force, or . . .sever[ing] its problematic portions while leaving the remainder intact." *Ayotte*, 546 U.S. at 328–29 (internal citation omitted) (citing *United States v. Raines*, 362 U.S. 17, 20-22 (1960) and *United States v. Booker*, 543 U.S. 220, 227-29 (2005)).

Although the cases frequently speak of "severing" the unconstitutional portion of a statute, the remedy for an unconstitutional statute may, as applied in particular situations, stop the unconstitutional application of a provision while applying the rest of the statute with minor alterations that are necessary to eliminate constitutional deficiencies. For example, in *Califano v. Westcott*, the Court endorsed the district court's decision to replace the statutory word "father" with its "gender-neutral equivalent." 443 U.S. 76, 92 (1979). Similarly, in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), after finding that a prohibition on material that "incites . . . lust" violated the First Amendment, the Court did not excise the word "lust" but instead effectively qualified it by holding that the statute would be "invalidated only insofar as the word 'lust' is to be understood as reaching protected materials." *Id.* at 504.

At the same time, respect for legislative prerogatives has also led this Court to minimize any alteration of statutes; when there are several ways in which a statute's constitutional defect might be remedied, this Court has disapproved options that require "more extensive" rewriting of a statute in favor of those that minimize any such rewriting. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509–10 (2010) (declining to "blue pencil" multiple provisions of statute); *see* Tobias A. Dorsey, *Sense and Severability*, 46 U. RICH. L. REV. 877, 894 (2012) ("When there is more than one way to [render the statute constitutional], the Court should choose the approach that does the least damage to the institutions and activities contemplated by the law.")

In short, "when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem," *id.* at 904, by fashioning a remedy consistent with what "'Congress would have intended' in light of the Court's constitutional holding," *Booker*, 543 U.S. at 246 (quoting *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality op.)).

### C. This Court Ordinarily Remedies Unconstitutional Discrimination In the Provision of A Statutory Benefit by Extending the Benefit to the Disfavored Class, Not by Withdrawing It From the Class Congress Intended to Benefit.

When this Court finds that a disparity in conferring statutory benefits violates the Equal Protection Clause, it must then decide *how* it will eliminate the unconstitutional disparity. Such a disparity can be eliminated by either "withdrawal of benefits from the favored class [or] by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984); *see also Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring).

Thus, the Court must decide whether to "level up" or "level down" the statute such that the unconstitutional classification is removed, and it makes this decision by looking to congressional intent. *See Welsh*, 398 U.S. at 365 (Harlan, J., concurring) ("In exercising the broad discretion conferred by a severability clause it is, of course, necessary to measure the intensity of commitment to the residual policy and confer the degree of potential disruption of

the statutory scheme that would occur by extension as opposed to abrogation."); *see also* Deborah Beers, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 COLUM. J.L. & SOC. PROBS. 115 (1975) (the Court focuses primarily on legislative intent when determining whether to extend or invalidate a constitutionally defective statute).

In addressing this question of how to cure an unconstitutional disparity in conferring benefits, this Court has consistently "suggested that extension, rather than nullification, is the proper course." *Califano*, 443 U.S. at 89. As then-Professor Ginsburg wrote in 1979, by extending under-inclusive statutes when they fail to comport with the Equal Protection Clause, "[t]he courts act legitimately . . . to preserve a law by moderate extension where tearing it down would be far more destructive of the legislature's will." Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 324 (1979).

*Califano v. Westcott* is instructive. There, the Court addressed an unconstitutional classification in the Social Security Act that granted benefits to families with dependent children only if the father, not the mother, became unemployed. 443 U.S. at 78. After first concluding that its prior decisions "suggest[ed] strongly" that the Court possessed the remedial capacity "to order extension" of benefits under a statute, the Court held that the statute's constitutional defect was properly remedied "by ordering that 'father' be replaced by its gender-neutral equivalent." *Id.* at 91–92. As a result of this

modification, "benefits simply will be paid to families with an unemployed parent on the same terms that benefits have long been paid to families with an unemployed father." *Id* at 92.

The Court emphasized that it reached this conclusion because extension of benefits was in line with congressional intent, noting that the withdrawal of benefits from "[a]pproximately 300,000 needy children . . . would impose hardship on beneficiaries whom Congress plainly meant to protect." *Id.* at 90. Moreover, the Court explained that "[t]he presence in the Social Security Act of a strong severability clause likewise counsels against nullification, for it evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." *Id.* (internal citation omitted); *see also Welsh*, 398 U.S. at 363–64 (Harlan, J., concurring) (noting that a "broad severability clause" is "[i]ndicative of the breadth of the judicial mandate" to "extend[] the statute"). Thus, the Court "adopted the simplest and most equitable extension possible" to ensure that the "beneficiaries whom Congress plainly meant to protect" remained covered by the statute. *Califano*, 443 U.S. at 90, 92–93.

Many other cases are to the same effect. *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (extending Social Security benefits to men and women on equal terms to remedy Equal Protection violation); *Jiminez v. Weinberger*, 417 U.S. 628, 637-38 (1974) (same); *Frontiero v. Richardson*, 411 U.S. 677, 691 n.25 (1973) (plurality op.) (same, and noting that its "conclusion in no wise invalidates the

statutory schemes except insofar as they require a female member to prove the dependency of her spouse"); *see also* Candace S. Kovacic, *Remedying Underinclusive Statutes*, 33 WAYNE L. REV. 39, 49-50 nn.66-72 (1986) (collecting cases).

Thus, as the Second Circuit noted in this case, this Court has consistently remedied Equal Protection violations by extending, rather than contracting, the statutory benefit. Pet. App. 38a–39a. Indeed, the only case in which the Court took a contrary view is the exception that proves the rule, as it turned on the existence of clear congressional intent *not* to extend the statutory benefits. In *Heckler v. Mathews*, 465 U.S. 728 (1984), the statute's severability clause and the legislative history behind it made clear that if the statutory provision was "found invalid . . . the application of the exception clause would not be broadened to include persons or circumstances that are not included within it." *Id.* at 733-34. Consistent with that specific congressional directive, the Court in *Mathews* recognized that "the severability clause would prevent a court from redressing [any] inequality by increasing the benefits payable to appellee." *Id.* at 738. At the same time, the Court recognized that, absent such clear congressional intent, "ordinarily 'extension, rather than nullification, is the proper course.'" *Id.* at 739 n.5 (quoting *Califano*, 443 U.S. at 89).

## II. THE SECOND CIRCUIT PROPERLY REMEDIED THE CONSTITUTIONAL DEFECT HERE BY APPLYING THE BENEFITS OF SECTION 1409(C) TO BOTH MOTHERS AND FATHERS.

In this case, the Court is faced with a choice between remedying the constitutional defect in § 1409 by (1) nullifying § 1409(c) altogether, thereby withdrawing the benefit of citizenship from children of unwed citizen mothers who cannot otherwise meet the longer presence requirements of § 1409(a), or (2) expanding § 1409(c) to apply to both men and women, thereby providing the congressional benefit of citizenship to children born abroad to unwed citizen fathers on the same terms as this benefit is granted to children of unwed citizen mothers. *Amici* submit that under the well-established principles described above, the Second Circuit's decision to remedy the constitutional defect by application of the provisions of § 1409(c) to Respondent and others in his position was correct.

First, the fundamental remedial goal of restoring Mr. Morales-Santana to his rightful position can only be achieved through extension, not nullification. As the Government concedes, nullification can create only *prospective* equality, making citizenship under § 1409(c) unavailable in the future both to children born to unwed male citizens and those born to unwed female citizens. It cannot produce equality as to those, like Respondent, who have already been born, because the Constitution does not permit the withdrawal of citizenship from those who are already citizens. *See* Pet. Br. 52; *Afroyim v. Rusk*, 387 U.S.

253 (1967). Respondent will be denied citizenship, while otherwise identically situated children of unwed female citizens will continue to be citizens.

A remedy that leaves such an ongoing disparity falls short of what this Court has traditionally considered necessary to remedy an Equal Protection violation. As the Court stated in *United States v. Virginia*, "[a] proper remedy for an unconstitutional exclusion . . . aims to '*eliminate [so far as possible] the discriminatory effects of the past*' and to 'bar like discrimination in the future.'" 518 U.S. at 547 (second alteration in original) (quoting *Louisiana v. United States*, 380 U.S. at 154).

In that respect, this case resembles *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), in which a taxpayer subjected to discriminatory taxation was held to be entitled to a refund, where the "nullification" remedy—"an increase of the taxes which the [favored taxpayers] should have paid," *id.* at 247—was likely impossible. As Professor Ginsburg noted, "due process . . . would impede state officials from reaching back to impose and collect additional taxes from the favored competitors." 28 CLEVE. ST. L. REV. at 307; *see also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 34–35 (1990) (describing an earlier case, *Montana National Bank*, as finding prospective-only relief inadequate to remedy a discriminatory tax because that would "not cure the mischief which had been done under the earlier construction" (quoting *Montana National Bank v. Yellowstone County*, 276 U.S. 499, 504 (1928)). As in these cases, the inability of a nullification remedy to remedy the past

unconstitutional discrimination should weigh heavily against its adoption.

Second, in the absence of a "clearly expressed [] preference for nullification, rather than extension" from Congress, as there was in *Heckler v. Mathews*, 465 U.S. at 739 n.5, this Court should follow its ordinary practice, described above, of remedying Equal Protection violations by applying the benefits of § 1409(c) on a nondiscriminatory basis, rather than nullifying them. We are aware of no evidence that Congress would have preferred nullifying § 1409(c) altogether, let alone the sort of clear expression necessary to justify a departure from this Court's ordinary preference for extension over nullification.

Third, although *Amici* do not purport to have special expertise concerning the intentions of the Congress that enacted § 1409(c), it appears that nullification of § 1409(c) would do far more to alter and frustrate the legislative scheme than would its extension to Respondent and those similarly situated. At a minimum, nullification would frustrate Congress's clear intention to grant derivative citizenship to children of unwed citizen mothers who had been present in the United States for at least one continuous year before giving birth. Further, one of the motivations behind the Act, was the "policy of preserving the unity of the family." S. Rep. No. 81-1515 at 433–34 (Apr. 20, 1950). And the increased difficulty of children obtaining the same citizenship as their American parent only heightens the possibility that family members will be separated from one another, contrary to Congress' intention, through § 1409(c), to *promote* family unification. For

this reason, too, extension, rather than nullification, of the conferred benefit here appears more consistent with Congress's intent.

Moreover, the INA, like the statute at issue in *Califano*, contains a strong severability clause. Although this clause alone does not fully address the question of congressional intent here, *see Welsh*, 398 U.S. at 365 (Harlan, J., concurring), its presence "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse," *Califano*, 443 U.S. at 90.

Perhaps more significantly, the "burdens" that would result from nullification of the benefit conferred by Congress here are particularly heavy because of the importance of the benefit at issue: citizenship. "Citizenship is a most precious right," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963), particularly in the United States. *See, e.g.*, *Schneiderman v. United States*, 320 U.S. 118, 122 (1943) ("[I]t is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men."). Just as the nullification of a benefits program that impacted "300,000 needy children . . . would impose hardship on beneficiaries whom Congress plainly meant to protect," the elimination of derivative citizenship for the class covered by § 1409(c) would exclude from the national community a group that Congress expressly deemed to be citizens. *See Califano*, 443 U.S. at 90.

In addition, by the Government's account, in the absence of § 1409(c), there was a "substantial risk that a child born out of wedlock to a U.S.-citizen mother in a country employing *jus sanguinis* rules of citizenship would be stateless at birth unless the child could obtain the citizenship of his mother." Pet. Br. at 34.[2] Whatever the congressional motivation related to statelessness when the statute was enacted, the possibility that nullification of § 1409(c) would not only have deprived its beneficiaries of U.S. citizenship, but by the Government's account might have rendered many of them stateless, makes it even less likely that Congress, faced with the choice, would have elected to eliminate § 1409(c).

The Government warns that extension of § 1409(c) to Respondent and others like him would open the floodgates to "untold numbers" of foreigners. Pet. Br. 51. But the Government provides no basis to believe that the "untold" number of individuals who (1) desire to claim U.S. citizenship, (2) were born out of wedlock to a U.S. citizen father, and (3) met the other applicable requirements of § 1409(c), including those relating to legitimation and/or parental responsibility,

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[2] As the Statelessness Scholars demonstrate, when enacted any risk of statelessness was not specific to children of American mothers; the ten-year residence requirement also put the foreign-born nonmarital children of American fathers at risk of statelessness. Resp. Br. 37–38. Hence, a remedy that "levels down" would arguably increase statelessness among foreign-born nonmarital children of American mothers and fathers, and would thus run contrary to the Congress's purported purpose in enacting § 1409(c).

is extraordinarily large.[3] Nor does the Government explain why a Congress that chose to confer citizenship on an equally "untold" number of children of unwed U.S. citizen mothers would have been so deterred by this prospect that it would have preferred to eliminate § 1409(c) entirely.

Further, surely one could have characterized the impact of *Weinberger v. Weisenfeld* as involving "untold numbers" of widowers, but whatever the numbers, the lessons of this Court's law is clear. Equal Protection remedies should respect the congressional scheme and implement as much as can be implemented while adjusting the statute to eliminate its unconstitutional facets.

In sum, *Amici* are aware of no persuasive reason to depart from the usual practice of remedying an Equal Protection violation by extending the statutory benefit to the disfavored class.

## III. THE SECOND CIRCUIT'S DETERMINATION REFLECTS A CONVENTIONAL APPLICATION OF ESTABLISHED EQUAL PROTECTION PRINCIPLES, AND IS WELL WITHIN THE AUTHORITY OF THE FEDERAL COURTS.

The Second Circuit's determination that, "[c]onforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection . . . Morales-Santana is a citizen as of his birth," Pet. App. 41a, was a faithful and conventional

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[3] Those requirements have varied in different versions of § 1409(c) applicable between 1940 and the present.

application of this Court's guidance for remedying Equal Protection violations. Contrary to the Government's assertion that this holding "exceeds the court's authority with respect to naturalization," Pet. Br. 49, in violation of *INS v. Pangilinan*, 486 U.S. 875 (1988), the Second Circuit applied the provisions of § 1409(c), save for its unconstitutional distinction between fathers and mothers.

### A. The Second Circuit's Finding That Respondent Is a Citizen Under the Statute, Once Rendered Constitutional, Is Squarely Within the Judicial Power.

The Government's contention that the Second Circuit's decision was beyond judicial authority, because the courts lack "the power to make someone a citizen of the United States," Pet. Br. 50 (quoting *Pangilinan*, 486 U.S. at 883-84), misconstrues *Pangilinan* and mistakenly conflates naturalization with at-birth citizenship.

Although the federal courts have traditionally shown significant deference to the political branches with respect to immigration and naturalization, they have properly distinguished between claims of citizenship and claims seeking naturalization, and have recognized the special status of citizenship. This Court made clear nearly a century ago, in *Ng Fung Ho v. White*, 259 U.S. 276 (1922), that individuals claiming citizenship are in a fundamentally different category from foreign nationals, and unlike such foreign nationals—who were subject to exclusively executive deportation proceedings—are entitled to judicial review of their claims. "Jurisdiction in the executive to order

deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact." *Id.* at 284; *see also Agosto v. INS*, 436 U.S. 748, 753 (1978) ("[T]he Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings.")

Moreover, the authority of the political branches over immigration and naturalization exists only within the bounds set by the Constitution. When "what is challenged . . . is whether Congress has chosen a constitutionally permissible means of implementing that power," this Court has recognized its "duty . . . of which it may not shrink, to give full effect to the provisions of the Constitution." *INS v. Chadha*, 462 U.S. 919, 940–41, 943 (1983). Indeed, the Court has never hesitated to exercise its judicial review responsibilities when, as here, an individual claims that statutory provisions that would deny him or her citizenship are unconstitutional. *See, e.g., Miller v. Albright*, 523 U.S. 420, 432 (1998) (plurality op.); *Afroyim*, 387 U.S. 253 (termination of citizenship unconstitutional); *Schneider v. Rusk*, 377 U.S. 163, 166 (1964) (unconstitutional to discriminate between native-born and derivative citizens); *Trop v. Dulles*, 356 U.S. 86 (1958) (expatriation provision unconstitutional).

This Court's assumption of its responsibility to recognize the citizenship of an individual upon the invalidation of a statute that denied him or her citizenship has deep roots. In *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898), this Court invalidated the application of the Chinese Exclusion

Act, 22 Stat. 61—which, among other things, stated that no "court of the United States shall admit Chinese to citizenship." Finding that the Act ran afoul of the Citizenship Clause of the Fourteenth Amendment, the Court held that Wong Kim Ark was a citizen of the United States. *See id.* at 704-05.

In confirming the petitioner's citizenship after it had invalidated the statute's unconstitutional application, the Court emphasized that it was not granting citizenship in contravention of Congress's plenary authority under Article I, Section 8, Clause 4. Rather, it was recognizing that the individual met the legal requirements for citizenship once the unconstitutional statutory provisions were removed, and that Congress' plenary authority over naturalization did not prevent a court from so holding. *See id.* at 704 ("The fact, therefore, that acts of congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the constitution . . . ."). Thus, the Court in *Wong Kim Ark*—as in later cases like *Afroyim* and *Trop*—saw its holding as a straightforward exercise of its traditional judicial responsibility to "say what the law is." *See Marbury*, 5 U.S. (1 Cranch) at 178.

This case is similar. As in *Wong Kim Ark*, the Government denies that the Respondent is a citizen on the ground that he fails to satisfy an allegedly unconstitutional statutory requirement. In addressing the constitutional claim, it is within the courts' power both to determine whether the gender-based classification here violates Equal Protection,

and—if it does—to determine whether it is more faithful to Congress's intent to cure the violation by extending the benefits of § 1409(c) to fathers or by withdrawing them from mothers. Choosing the former remedy does not amount to the creation of a judge-made right to citizenship; rather, it is an ordinary effort to effectuate congressional intent to the maximum extent possible.

This case is therefore entirely different from *Pangilinan*, in which the lower court ordered that certain foreign nationals be naturalized as a judge-made equitable remedy that was concededly contrary to congressional intent. Critically, it was "incontestable (and uncontested) that respondents have no statutory right to citizenship," 486 U.S. at 882-83, and the plaintiffs asked the Court to order their naturalization by the "invocation of [its] equitable powers." *Id.* at 885. The Court rejected this request, holding that it lacked *independent* power to confer citizenship upon non-citizens: "the power to make someone a citizen of the United States has not been conferred upon the federal courts . . . *as one of their generally applicable equitable powers.*" *Id.* at 883–84 (emphasis added). However, while ruling out any *independent* judicial authority to confer citizenship, the Court left untouched the courts' responsibility to adjudicate constitutional or statutory claims to citizenship.

Indeed, in *Pangilinan* itself, after rejecting the respondents' request for an exercise of the courts' general equitable powers as beyond judicial authority, this Court went on to address on the merits—with no suggestion of any lack of judicial authority—the

respondents' constitutional claims seeking identical relief.

Here, the Court is in no way being asked to exercise any purported independent judicial authority to confer citizenship. Nor is it being asked to order the naturalization of any non-citizen. Respondent argues that under § 1409, as properly (and constitutionally) interpreted, he became a citizen *at birth*. The Court is being asked to perform the core judicial function of remedying an Equal Protection violation—a task which includes determining how to eliminate the unconstitutional portion of the statute in the way most consistent with congressional intent. This classic judicial function does not intrude on Congress's authority over naturalization in any way, and implicates no constitutional concern. This Court's role in filling gaps and fashioning remedies for constitutional violations is a familiar one, and one that properly respects congressional authority. *See* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 26-27 (1994).

For similar reasons, the Government's reliance on 8 U.S.C. § 1421(d), which specifies that "[a] person may only be *naturalized* as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the INA] and not otherwise," is misplaced. Pet. Br. 51 n.11. Here, what Respondent seeks is not naturalization—the subject of § 1421(d)—but rather a determination that by operation of law he is already a citizen. As this Court established long ago in *Ng Fung Ho*, individuals claiming citizenship are in a fundamentally different

category from non-citizens. 259 U.S. at 284–85. Congress, moreover, has incorporated that constitutional principle into the INA: Determination of an individual's claim of citizenship in a removal proceeding is *not* governed by § 1421(d), but by § 1252(b)(5), which not only permits but *requires* the federal courts to decide such claims: *See id.* (determination by court "[i]f the petitioner claims to be a national of the United States"); *see also Agosto*, 436 U.S. at 753 ("In carving out this class of cases [for judicial review], Congress was aware of our past decisions holding that the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings." (citing *Ng Fung Ho*, 259 U.S. at 284)).

Because Respondent claims citizenship by operation of law, and because he is not seeking an exercise of general equitable authority, *Pangilinan* has no application. Rather, the courts are fully empowered to remedy the claimed Equal Protection violation in conformity with conventional principles. Whatever the breadth of the so-called "plenary powers" doctrine, it cannot be read to reach citizenship rights obtained through birth abroad, if the statutory criteria for such citizenship are met.

### B. Six Justices Have Indicated that an Extension of § 1409(c) to Remedy a Constitutional Violation Is a Permissible Exercise of Judicial Authority.

This issue has been before this Court before, and six Justices have, on prior occasions, determined that there is no constitutional obstacle to the relief sought

here. In *Miller v. Albright*, 523 U.S. 420 (1998), as in this case, the Court considered a Fifth Amendment Equal Protection "challenge to the distinction drawn by section § 309 of the [INA], as amended, 8 U.S.C. § 1409, between the child of an alien father and a citizen mother, on the one hand, and the child of an alien mother and a citizen father, on the other." *Id.* at 424 (plurality op.). Although the Court splintered on the merits, five Justices expressly recognized that confirmation of the Petitioner's citizenship following the severance of an unconstitutional provision would be an appropriate remedy and would not encroach upon Congress's plenary authority over matters of naturalization.

First, Justice Stevens, writing for the plurality and joined by Chief Justice Rehnquist, rejected the notion that the Petitioner lacked standing because, due to the gender-based classification in § 1409, she was not a citizen of the United States, and therefore had "no substantive rights cognizable under the Fifth Amendment." *Id.* at 433 n.10. The plurality opinion noted that "[e]ven if th[is] is so, the question to be decided is whether petitioner is such an alien or whether, as she claims, she is a citizen." *Id.* In the event that the Court concluded that the Petitioner was indeed a citizen, the plurality explained, that holding would not infringe Congress's plenary authority under Article I, Section 8, Clause 4 of the Constitution because a "judgment in her favor would confirm her pre-existing citizenship rather than grant her rights that she does not now possess." *Id.* at 432.

Justice Breyer, joined by Justices Souter and Ginsburg, echoed this principle in dissent. Rejecting the claim that the Court was "powerless to find a remedy," Justice Breyer noted that the "remedy is simply that of striking from the statute the two subsections that offend the Constitution's equal protection requirement." *Id.* at 488 (Breyer, J., dissenting). "With those [unconstitutional] subsections omitted," the Petitioner would then meet all of the requirements of the statute. *Id.* As a result, unlike in *Pangilinan*, the Petitioner in *Miller* became a "citizen of the United States at birth" by virtue of the statue passed by Congress, once cured of its constitutional defect. *Id.* at 488–89 (alteration omitted). As Justice Breyer explained: "Whatever limitations there may be upon the Court's power to grant citizenship, those limitations are not applicable here, for the Court need not grant citizenship. The statute itself grants citizenship automatically, and 'at birth.' And this Court need only declare that that is so." *Id.* at 488.

Three years later, in *Nguyen v. INS*, 533 U.S. 53 (2001), Justice O'Connor added her voice to this consensus.[4] *Nguyen*, like *Miller* and the present dispute, again involved a Fifth Amendment Equal Protection challenge to the "different requirements" imposed by 8 U.S.C. § 1409 "for the child's acquisition of citizenship depending upon whether the citizen

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[4] While Justice O'Connor participated in *Miller*, she concurred in the judgment on standing grounds, and therefore had no occasion to address the remedial issue. *See Miller*, 523 U.S. at 445 (O'Connor, J., concurring in the judgment).

parent is the mother or the father." 533 U.S. at 56–57. Writing in dissent, and joined by Justices Souter, Ginsburg, and Breyer, Justice O'Connor expressed her disagreement with the suggestion by the majority that "[t]here may well be 'potential problems with fashioning a remedy' were [the Court] to find the statute unconstitutional." *Id.* at 72 (quoting *Miller*, 523 U.S., at 451 (O'Connor, J., concurring in judgment)).

She offered three reasons for this conclusion. First, severance of the unconstitutional portions of § 1409 was possible, and therefore a remedy could be afforded to the Petitioner, because Congress included a "general severability clause" in the INA which "is unambiguous and gives rise to a presumption that Congress" intended for the "validity of the INA as a whole, or any part of the INA to depend on whether' any one provision was unconstitutional." *Id.* at 94–95 (O'Connor, J., dissenting) (brackets omitted) (quoting *Chahda*, 462 U.S. at 932).

Second, she argued, as Respondent does here, that nothing in *Pangilinan* precludes the confirmation of citizenship by this Court, because petitioners did not "seek the exercise of . . . equitable power[s]," but instead the "severance of the offending provisions so that the statute, free of its constitutional defect, can operate to determine whether citizenship was transmitted at birth." *Id.* at 95-96.

Finally, Justice O'Connor noted that "this Court has often concluded that, in the absence of legislative direction *not* to sever the infirm provision, extension, rather than nullification, of a benefit is more faithful to the legislative design." *Id.* at 96. Accordingly,

Justice O'Connor agreed with the plurality and dissenting opinions in *Miller* that a remedy recognizing the Petitioner's citizenship would not intrude on Congress's exclusive authority to regulate naturalization under the Constitution.

In sum, six Justices, including five of the Justices in *Miller*, have recognized that no constitutional problem is raised by the requested remedy here. *Amici*'s point is not that this creates a binding precedent entitled to *stare decisis*. Rather, it simply confirms the extent to which the Second Circuit's ruling in this case—and the argument offered above—is deeply consistent with longstanding views on the authority of the federal courts to remedy equal protection violations, in the field of immigration law and otherwise. In contrast, only two Justices have ever appeared to endorse the government's argument here—that the requested remedy confers citizenship in violation of Congress's plenary authority over immigration. *See Nguyen v. INS*, 533 U.S. 53, 73, 74 (2001) (Scalia, J., concurring) (joined by Thomas, J.); *Miller*, 523 U.S. at 452–53 (Scalia, J., concurring in the judgment) (joined by Thomas, J.). Indeed, as Justice Scalia himself acknowledged, a "majority of the Justices in *Miller* . . . concluded otherwise." *Nguyen*, 533 U.S. at 73 (Scalia, J., concurring).

* * *

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment.

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ECORD
AND
BRIEF

No. 15-1191

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IN THE

# Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

*Petitioner,*

*v.*

LUIS RAMON MORALES-SANTANA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici curiae* are independent human rights, women's rights and non-profit organizations working at the global, regional and national levels to address issues of nationality, citizenship, refugees and statelessness. They come from every region of the world. The full statements of interest of the *amici* appear in the Appendix to this brief.

## SUMMARY OF ARGUMENT

This Court has often examined the opinions of the world community when considering constitutional cases that address concerns common among nations. The case at bar is such a case, presenting a question of domestic citizenship that both affects other nations and relates to fundamental issues of sex equality that cut across jurisdictional boundaries. As Petitioner acknowledges, when shaping laws affecting individuals born abroad, the government should not "ignore the state of the law throughout the world." (Pet'r Br. at 11.)

The disparate treatment of unwed mothers and unwed fathers in Sections 1401 and 1409 of the

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[1] The parties have lodged blanket letters of consent to the filing of *amicus curiae* briefs in this case. Pursuant to this Court's Rule 37.6, *amici* state that no party or counsel for a party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, has made a monetary contribution towards the preparation or submission of this brief.

Immigration and Nationality Act is not substantially related to the government's interest in protecting against the risk of statelessness and assuring a sufficient connection to the United States when conferring citizenship to foreign-born children of a U.S. citizen parent. The significant majority of other nations treat unwed citizen mothers and fathers equally in their ability to confer citizenship on their children. The Act's departure from this norm does not further either of the interests of avoiding statelessness or securing a connection to the United States.

The world community recognizes sex equality as a fundamental human right and has rejected sex-based citizenship classifications. International and regional treaties and decision-making bodies are concerned with statelessness, but they demand reconciling national policies to avoid statelessness with accepted norms of equal citizenship. Even the United States calls on the international community to grant equal rights to men and women to confer nationality on their children.

The laws of foreign nations have increasingly rejected sex-based classifications when conferring citizenship rights. *Amici* have gathered here foreign law decisions as examples of the consensus that has formed among other nations. All but one of the supreme courts from other nations that have addressed the sex-based citizenship laws in the past four decades have rejected sex-based classifications. Several of those highest courts characterize sex-

based citizenship classifications as "irrational" and "unreasonable."

A decision to correct the statute at issue here under the Fifth Amendment would find ample support from the opinions of the world community. In contrast, a decision upholding sex-based classifications would not only dilute domestic equal protection jurisprudence but would also run the risk of undermining equality norms worldwide, as other national supreme courts, as well as multiple other courts and law-making bodies, look to this Court for guidance on this common issue.

## ARGUMENT

### I. BOTH FOREIGN AND INTERNATIONAL LAW ARE RELEVANT TO THIS COURT'S REVIEW OF 8 U.S.C. §§ 1401(a)(7) AND 1409

For more than two centuries, this Court has, when relevant, examined the position of the world community and paid "decent respect to the opinions of mankind" in its decisions.[2] In some instances, review of the international context is imperative, since "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[3]

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[2] The Declaration of Independence ¶ 1 (U.S. 1776); *see* Sarah Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1, 5-6, 14, 99 (2006).

[3] *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see The Paquete Habana*, 175 U.S. 677, 700 (1900).

In instances where domestic law is doctrinally intertwined with foreign laws, the examination of the relevant foreign legal doctrine has been a longstanding, uncontroversial practice.[4] A majority of the Court also finds utility in examining foreign and international laws and practices when common principles are at stake, because global consensus provides guidance relevant to the Court's "independent conclusion" regarding U.S. law.[5] As Justice Sandra Day O'Connor observed, "there is great potential for our Court to learn from the experience and logic of foreign courts and international tribunals – just as we have offered these courts some helpful approaches from our own legal traditions."[6]

The laws and practices of the world community have been particularly important when principles of liberty and equality are at issue. For example, in *Lawrence v. Texas*, the Court looked to the "values we share with a wider civilization," concluding that decisions from other countries and international entities that protected the liberty of individuals to engage in private intimate conduct

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[4] *See, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457-61 (1793); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 n.a (1820).

[5] *See Graham v. Florida*, 560 U.S. 48, 80 (2010) (noting that the sentencing practice at issue has been "rejected the world over").

[6] Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35, 41 (1997).

were relevant to its decision.[7] Similarly, in *Washington v. Glucksberg*, arising under the Due Process Clause of the Fourteenth Amendment, a majority of this Court catalogued the practices "in almost every western democracy" that criminalize assisted suicide.[8] Most recently, in *Obergefell v. Hodges*, the four dissenting justices cited the laws and practices of other nations and cultures to support their conclusions.[9]

The case at bar benefits from a review of foreign law, because the Immigration and Nationality Act is affected by the laws of other nations. Acquisition of citizenship is an instance where domestic law is intertwined with foreign law, requiring an understanding of the international context in which our own law is situated. Further, the central question in this case is an issue of common concern that crosses national boundaries. Conflicts between sex equality norms and citizenship laws have confronted national courts around the globe and have been addressed by many international and regional bodies. Cases involving

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[7] 539 U.S. 558, 576-77 (2003).

[8] 521 U.S. 702, 710 (1997).

[9] *See* 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting); *id.* at 2636 n.5 (Thomas, J., dissenting); *id.* at 2642 (Alito, J., dissenting); *see also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing relevant international law).

these conflicts are particularly appropriate for comparative analysis.[10]

## II. FOREIGN LAW DOES NOT SUPPORT USING SEX-BASED DIFFERENCES TO ADDRESS STATELESSNESS AND CONNECTIVITY

The asserted relationship between the differential sex-based requirements of Sections 1401 and 1409 is not substantially related to the achievement of the government's claimed twin interests in reducing the risk of statelessness and assuring a sufficient connection to the United States when conferring citizenship to foreign-born children of unmarried U.S. citizen parents. To justify its disparate treatment of unwed mothers and unwed fathers, the government focuses on the parents' status at a singular moment, asserting that "at the moment of birth, the mother of a child born out of wedlock was typically treated throughout the world as the child's only legal parent." (Pet'r Br. at 28.) This assertion is narrowly drawn in a way that makes the "moment of birth" seem to carry more weight than it actually does. Any broader view of the legal relationship between an unwed father and his child exposes the logical gaps in the government's position.

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[10] *See* Vicki Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 Loy. L.A. L. Rev. 271, 351-58 (2003).

### A. The Presuppositions Behind Petitioner's Argument Are Questionable

Three aspects of the government's assertion merit consideration before examining the putative relationship between the statute and the statelessness and connection interests invoked by the government.

First, the government's argument that only mothers have a "legally recognized relationship" (Pet'r Br. at 28) with a child at the "moment of birth" is founded on the unremarkable proposition that mothers, not fathers, give birth to children. This is literally true as a fact of biology, but inapt in assessing the risk that a foreign-born child of unwed parents will lack a nationality or in addressing the concern that such a child has a sufficient connection to the United States to be deemed worthy of citizenship. Any point about the divergence in "legal relationships" between unwed mothers or fathers and their foreign-born children that is not purely biological rests on assumptions that do not justify treating unwed fathers and mothers differently.

With the 1952 Act's removal of the "in the absence of such legitimation or adjudication" language,[11] the statute at issue effectively treats foreign national unwed fathers as either unknown or permanently out of the picture, which very often will not be the case. The government's argument does

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[11] Immigration and Nationality Act, ch. 477, 66 Stat. 238 (8 U.S.C. § 1409) (1952).

not adequately account for the role that unwed fathers commonly play in the lives of their children following birth, despite that role bearing directly on the governmental interests that supposedly motivated the creation of the discriminatory statutory scheme. Among other things, the government does not account for children born to parents who are not married but are nonetheless in a stable relationship. Nor does it account for mothers who do not maintain a role in their children's lives following birth, despite the "legal relationship" established at that time.

Second, the government's repeated reliance on "the moment of birth" begs the question. Only by framing its argument in terms of "the moment of birth" – rather than "an hour after birth," or "a day after birth," or "at the time the birth certificate is recorded" – can the government draw a distinction between the "legal relationships" of unwed mothers and fathers to their children that does not rely on impermissible gender stereotyping. But there is nothing special about the moment of birth for purposes of assessing whether the foreign-born children of unwed U.S. citizen mothers were, and are, at heightened risk of statelessness, or whether a child is likely to be raised free of competing national loyalties, such that a more burdensome physical presence requirement for the father is substantially related to the achievement of the government's objectives.

Although a father is not required to be present at "the moment of birth" as a matter of biology, as soon as he acknowledges the child he is in the same position as an unwed U.S. citizen mother with respect to his ability to foster a connection between his foreign-born child and the United States. An unwed father can present himself and take whatever steps are prescribed by the relevant nation to have himself legally established as his child's parent in some reasonable period following birth, whether those steps are as simple as signing a birth certificate or as involved as demonstrating proof of paternity. So it does not matter that at the precise "moment of birth," only the child's mother is incontrovertibly identifiable.

Third, it is the establishment of parentage by either parent, rather than the establishment of paternity by the father, that is a necessary step in the forming of a "legal relationship" between parent and child. The fact that mothers, generally speaking, can establish their parentage more easily should be irrelevant in determining the circumstances in which their children should be allowed to become U.S. citizens. The government states that "[e]ven today, the father of a child born out of wedlock anywhere in the United States must take some affirmative step to establish his legal status as the child's father." (Pet'r Br. at 41.) But this is a truism: any request by an unwed father to be recognized as the legal parent of his child requires some affirmative step, whether that step is

straightforward or more complex, and whether it is taken before or after birth. The only reason this is not the case for married fathers is the presumption of paternity based on matrimony. A birth mother's legal relationship with her child also must be established after the fact in certain countries, usually through an attestation and declaration of birth by an attending physician and the mother.[12]

Even where the mother's legal relationship with a child is established by operation of law at the moment of birth, many countries recognize an unmarried father's parentage at the moment of birth as well. For example, the laws of some countries provide that biological parents, whether married or not, are generally the holders of parental responsibility concerning their child, a responsibility that arises at childbirth.[13] Other countries provide that an unwed father may be recognized as the child's legal parent at the time of birth by providing

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[12] *See, e.g.*, France (Code Civil [C. Civ.] art. 57 (Fr.)); Ukraine (Family Code of Ukraine, ch. 12, Art. 125(1) (Ukr.)); *see also* Hague Conference on Private and International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, at 8, Prel. Doc. No. 3C (2014) (discussing countries in which a birth mother's legal maternity does not arise "by operation of law" at the moment of birth).

[13] *See, e.g.*, Czech Republic (Sec. 34 ¶ 2 Czech Family Code) (Czech)); Israel (CA 3077/90 John DoePlonit vs. John DoePloni, 49(2) PD 578 [1995] (Isr.)); Poland (Kodeks rodzinny i opiekuńczy [Family and Guardianship Code], Art. 93 § 1 (25 Feb. 1964) (Pol.)).

some written documentation beforehand.[14] Elsewhere, an unwed father may gain legal status through joint registration of the birth with the mother.[15] Still other countries allow unwed fathers to establish a legal relationship at the time of their child's birth by simply acknowledging parentage at that moment or by prior cohabitation with the birth mother under defined conditions.[16]

For many countries, the affirmative steps to establish filiation between an unwed father and his

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[14] *See, e.g.*, Switzerland (Schweizerisches Zivilgesetzbuch [ZGB], Code civil [CC], Codice civile svizzero [CC] [Civil Code] July 1, 2014, SR 21, RS 210, art. 298 (Switz.)).

[15] *See, e.g.*, England/Wales (Children Act, 1989, c.41, § 4(1) (Eng.)); *see also* Hague Conference on Private and International Law, *supra* note 12, at 10 (in many countries a father may voluntarily acknowledge legal paternity when it has not arisen by operation of law through a joint written statement with the birth mother); *cf.* Vietnam (Law on Vietnamese Nationality, Số: 24/2008/QH12, Art. 16.2 (Nov. 13, 2008) (child born abroad who has one Vietnamese parent and one foreign national parent gains nationality at birth if the parents so agree in writing prior to the birth)).

[16] *See, e.g.*, Dominican Republic (Ley No. 14-19, Codigo para la Proteccion de Ninos, Ninas y Adolescentes [Law No. 14-19, Code for the Protection of Children and Adolescents] Gaceta Official, Art. 21, Apr. 25, 1994 (enacted April 22, 1994) (unmarried father may acknowledge parentage after his child's birth)); Australia (*Family Law Act 1975* (Cth) s 69Q (Austl.) (unmarried father may establish legal relationship with child at time of birth by prior cohabitation with birth mother)); Canada (BC) (Family Law Act, S.B.C. 2011, c. 25, § 26(2)(d) (Can.) (same)); Canada (Ontario) (Children's Law Reform Act, R.S.O. 1990, c. C.12, § 8(1)(4)-(5) (Can.) (same)); New Zealand (Care of Children Act 2004, Public Act 2004 No 90, Cl. 17(3)(b) (N.Z.) (same)).

child do not occur until after the child is born.[17] Yet it is the fact that such steps are commonplace and often straightforward[18] that makes the statute's failure to account for them perplexing, if the aim of the statute were to address the interests of reducing statelessness and ensuring a sufficient connection to the United States. In most countries, affirmative steps to establish paternity or to record or attest to the fact of filiation are not meaningful obstacles to father-child legal relationships that would justify the differential physical presence requirements of unwed fathers and unwed mothers in the conferral of citizenship to their foreign-born children.

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[17] *See, e.g.*, Northern Ireland (Family Law Act (Northern Ireland), 1995, c. 12, § 7(1)(a) (as amended July 17, 2001) (unmarried father has parental responsibility if he becomes registered as the child's father)); Scotland (Family Law (Scotland) Act, 1995, c.36 § I(b)(ii) (as amended Jan. 20, 2006) (same)).

[18] *See, e.g.*, Scotland (Children (Scotland) Act, 1995, § 4(1)-(2) (as amended July 3, 1997) (after child's birth, unmarried parents can sign a form agreement prescribed by the Secretary of State to grant the father rights and to register him as the child's father)); Finland (Paternity Act 1975, c.3 § 15(1)-(3) (including amendments up to 379/2005) (after child's birth, unmarried father can voluntarily acknowledge paternity by signing acknowledgment in the presence of notary or other local official)); Iceland (Act in Respect of Children (Unofficial Translation) no. 76/2003, art. 4 (as amended by Act No. 115/2003) (parents fill out form and deliver it to national registry without any action from district magistrate)).

### B. Foreign Law Does Not Support The Government's Rationale That Sex-Based Discrimination Is Necessary To Avoid The Risk Of Statelessness

The government asserts that the differential treatment of unwed U.S. citizen mothers and fathers under Sections 1401 and 1409 was motivated in large part by an interest in reducing the risk that foreign-born children of U.S. citizen unwed parents would be born stateless. The proffered rationale is that a child born abroad to an unwed U.S. citizen mother and a foreign citizen father faced particular hurdles in avoiding statelessness, because most *jus sanguinis* countries at the time the statutory provision was adopted purportedly would not permit their unwed male citizens to transmit their nationality to the child at the time of birth. (*See* Pet'r Br. at 30). Yet if anything, a more stringent physical presence requirement for unwed fathers now *increases* the risk of statelessness, a result at odds with Congress's supposed motivation.

The nationality laws of the significant majority of *jus sanguinis* countries today treat unwed citizen mothers and fathers equally in their ability to confer citizenship on their children. Most countries impose no sex-differential burden on unwed citizens – again, assuming that some requisite acknowledgment or establishment of parentage has been made. For example, as of 2015, 43 of 53 African countries treat unwed citizen fathers and mothers equally in conferring a right to

citizenship on their children, whether born at home or abroad.[19] The same is true for all European countries, in light of recent legislation in Denmark and Austria correcting their previous inequity on the subject.[20] As a result, there is no special risk of statelessness when an unwed U.S. citizen, regardless of sex, has a child with a citizen of one of those countries.

Moreover, in the few remaining countries that do impose sex-discriminatory restrictions on the conferral of citizenship by unwed parents, it is the children of unwed local *mothers* in those countries who are far more likely to bear that brunt of statelessness.[21] *Amici* have identified 21 countries in the world that do not permit an unmarried mother who is a citizen of that country to pass her nationality to children born abroad on an equal basis as an unmarried citizen father.[22] In 16 of those

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19 *See* African Commission on Human and Peoples' Rights, *The Right to Nationality in Africa* 68 (2015).

20 *See* Denmark (Consolidated Act on Danish Nationality, Act. No. 422, 7 June 2004 (as amended by Act No. 729 of 25 June 2014)); Austria (Verfassungsgerichtshof [VfGH] [Constitutional Court] 1984, Erkenntnisse und Beschlusse Verfassungsgeruchtshofes [VfSlg] No. 10.036/1984 (Austria)).

21 *See* Equality Now, *The State We're In: Ending Sexism In Nationality Laws* 14-16 & Annex (2016).

22 *See id.* (Bahrain, Brunei, Burundi, Iran, Iraq, Jordan, Kuwait, Lebanon, Liberia, Libya, Mauritania, Nepal, Oman, Qatar, Saudi Arabia, Sierra Leone, Somalia, Swaziland, Syrian Arab Republic, Tunisia, and the United Arab Emirates).

countries, it is also harder for unmarried mothers than for unmarried fathers to transmit their citizenship to children born inside the country.[23] Thus, to the extent the United States makes it more difficult for children of unwed U.S. citizen fathers and foreign citizen mothers to gain U.S. citizenship, the statute at issue has increased the risk of statelessness, rather than reduced it.

Conversely, *amici* have identified only 5 countries in the world – the United States, Madagascar, Malaysia, the Bahamas, and Barbados – in which an unmarried citizen father today faces a disproportionate burden in transmitting his nationality, beyond establishment of parentage. In the United States, Madagascar, and Malaysia, an unmarried father cannot pass his nationality to a child born abroad without meeting additional requirements unrelated to proof of paternity.[24] In the Bahamas and Madagascar, an unmarried father cannot pass his nationality to a child born inside the country on an equal basis as an unmarried mother.[25] And in the Bahamas and Barbados, an unmarried father cannot pass his nationality to a child born abroad at all.[26]

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[23] *See id.* (all named above except Iraq, Liberia, Mauritania, Sierra Leone, and Tunisia).

[24] See *id.* at 14-15, 66-68, 70-71.

[25] See *id.* at 14-15, 33-34, 66-68.

[26] *See id.* at 14-15, 33-34, 37.

In short, the different treatment of unwed U.S. citizen fathers and mothers under Sections 1401 and 1409 does nothing to reduce – and may well *increase* – the risk of statelessness. A one-year physical presence requirement for both unwed mothers and unwed fathers would protect against the risk of statelessness to a greater degree than a one-year requirement for mothers and a ten-year requirement for fathers.[27]

Many countries today have provisions for the transmission of nationality in cases where one or both parents are unknown or stateless, recognizing that special provision should be made to minimize the number of children born without a nationality.[28] The government asserts that Sections 1401 and 1409 serve as blunt instruments to account for that circumstance, but as we have shown, the statute is based on incorrect assumptions about foreign

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[27] The statute was amended in 1986 to shorten the physical presence requirement for unwed fathers from 10 years to 5 years. However, the 10-year requirement in the 1952 Act applies to the Respondent in this case.

[28] *See* United Nations Convention on the Reduction of Statelessness, Art. I, Sec. 1, Aug. 30, 1961, 969 U.N.T.S. 175 (granting nationality to persons born within their borders "who would otherwise be stateless"); *cf.* Jordan (Law No. 6 of 1954 on Nationality, art. 3(4) (Jan. 1, 1954) (last amended 1987) (establishing nationality for any person born in the country to a citizen-mother and Stateless father)); United Arab Emirates (United Arab Emirates: Federal Law No. 17 for 1972 Concerning Nationality, Passports and Amendments Thereof, art. 2(D) (Nov. 18, 1972) (same)).

citizenship law and may likely serve to work against its intended purpose. That is not rationally, let alone substantially, related to the purported goal of the statute.[29]

### C. Foreign Law Does Not Support Using Sex-Based Differences To Ensure A Sufficient Connection To The United States

The asserted relationship between the physical presence requirements in Sections 1401 and 1409 and the concern that foreign-born children of unwed parents have a sufficient connection to the United States before citizenship should be granted is founded on premises that are particularly inapposite in today's world. According to the government, "a foreign-born child is presumptively subject to competing claims of national allegiance" if the child's parents are of different nationalities. (Pet'r Br. at 18.) A lower physical presence requirement was thus ostensibly appropriate for unwed U.S. citizen mothers because "at the time of her child's birth . .

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[29] Any purported concern about statelessness is immaterial with respect to the more than 30 countries, including Brazil, Canada, and Mexico, that currently confer unrestricted citizenship to children born within their borders. *See* K. Culliton-Gonzalez, *Born in the Americas: Birthright Citizenship and Human Rights*, 25 Harv. Hum. Rights J. 134-36 (2012); J. Feere, *Center for Immigration Studies, Birthright Citizenship in the United States: A Global Comparison* (2010). By definition, there is no risk of statelessness for children born in any of these *jus soli* countries, no matter the citizenship or marital status of their parents. Yet the differential residency requirement applies to children in these countries as well.

[there] would have been no competing parental claim of connection to a foreign country." (*Id.* at 32.)

Prior to 1934, U.S. nationality law reflected the apparent belief that U.S. citizen mothers were unable to pass on a sufficiently American character to their foreign-born children, no matter how long the mother had lived in the United States.[30] The development of the statute from the 1940 Act to the 1952 Act, however, resulted in unwed U.S. citizen mothers being deemed uniquely capable of ensuring, based on minimal time spent in this country, that their children would not lack a connection to the United States.

From the government's perspective, it is not that unwed U.S. citizen mothers are better able, or even more likely, to transmit "Americanism" to their children than unwed fathers. Rather, the government asserts that if a U.S. citizen mother is the only legally recognized parent of a foreign-born child at the time of birth, then there is no need to impose a heightened physical presence requirement, because there are no significant concerns that the child will be subject to competing national loyalties. In effect, a foreign-born child of an unwed U.S.

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[30] The first statute Congress enacted extending citizenship to foreign-born children provided that citizenship would pass automatically so long as the U.S. citizen father had ever resided in the United States, but made no such provision for a U.S. citizen mother. *See* Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. That state of affairs persisted in the statutes passed in 1795, 1802, 1855, and 1907. *See Rogers v. Bellei*, 401 U.S. 815, 823-26 (1971).

citizen mother is forever treated as having only one legally recognized parent under the statute, "without regard to whether the father's paternity was later legally established." (Pet'r Br. at 28.) This scheme is premised on a counterfactual understanding of domestic and foreign law given the many ways that unwed fathers may – and frequently do – establish legal relationships with their children, as discussed above. Yet this treatment also stands at cross-purposes to the government's asserted concern of ensuring a sufficient connection between the child and the United States.

This disconnect can be illustrated simply: Jane Doe is a 20-year-old U.S. citizen who was born in the United States and lived there continuously until her first birthday, when her family moved to Brazil. She has resided in Brazil for the past 19 years, has never returned to the United States, and plans on living there for at least another 19 years. She has no immediate family in the United States. She is unmarried and has just given birth to a child whose father is an Argentinean national. John Smith is a 20-year-old U.S. citizen who was born in the United States and lived there continuously until three weeks shy of his 19th birthday, when he moved to Brazil. He has resided in Brazil for the past year but plans on moving back to the United States in the near future. He has many immediate family members in the United States. He is unmarried and has just fathered a child whose mother is an Argentinean national, and has acknowledged

paternity. There is no basis to conclude that Jane's child has a greater connection to the United States than John's child – in fact, just the opposite – yet under the statute as it applied to the Respondent in this case, Jane's child would be an American citizen and John's child would not.

Conversely, just because a child has not been "legitimated" by his or her foreign citizen father at the moment of birth does not mean the father is not in a stable relationship with the mother or that the father otherwise will not be a significant part of raising the child going forward, thus presenting the child with a foreign influence that could compete with the American character of the mother. Under this statute, an unwed U.S. citizen mother is presumed to be raising her child as an American, free of competing influences and loyalties, even if she is cohabitating with the foreign citizen father, and even if she marries him the day after the child is born. By contrast, the child of an unwed U.S. citizen father is presumed to be subject to the competing influence of the foreign mother's nationality, even if she is nowhere to be found.

The assumption that there are no competing national loyalties when the U.S. citizen mother is the only legally recognized parent at time of birth therefore does not withstand scrutiny. The differential treatment of unwed citizen mothers and unwed citizen fathers of foreign-born children cannot be justified as serving the interests of ensuring a

sufficient connection between the child and the United States.

## III. THE OVERWHELMING WEIGHT OF WORLD OPINION SUPPORTS SEX EQUALITY IN CITIZENSHIP LAWS

### A. International Treaties and Decisions of International Bodies Consistently Require Sex Equality in Citizenship Law

The world community has spoken clearly through international treaties and decisions of international bodies to reject sex-based citizenship classifications. International law universally recognizes sex equality as a fundamental human right.[31]

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[31] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 71, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as sex"); International Covenant on Civil and Political Rights ("ICCPR"), art. 3, Dec. 16, 1966, 999 U.N.T.S. 171 ("[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"); Convention on the Rights of the Child ("CRC"), art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3 ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's sex"); CEDAW, *infra* note 32, art. 2(a) (the purpose of the convention is "[t]o embody the principle of the equality of men and women in their national constitutions and to ensure, through law and other appropriate means, the practical realization of this principle").

The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")[32] addresses sex equality in the citizenship context, stating that "State Parties shall grant women equal rights with men with respect to the nationality of their children."[33] The Convention on the Rights of the Child ("CRC") guarantees every child the right to acquire nationality. Although the United States has signed but not ratified CRC and CEDAW, both conventions have been widely ratified by member countries of the United Nations, and are thus considered customary international law.[34]

This principle of sex equality, and in particular sex equality in citizenship law, has been reinforced by international and regional declarations, conventions and conferences. For instance, the United Nations Fourth World Conference on Women in 1995 adopted the Beijing Platform, highlighting the commitment of member

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[32] Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), Dec. 18, 1979, 1249 U.N.T.S 13.

[33] *Id.* art. 9(2).

[34] Following Somalia's ratification of the CRC on 1 October 2015, the United States is the only country that has not ratified this treaty. *See* United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en. The only countries that have not ratified CEDAW are the United States, Iran, Palau, Somalia, Sudan and Tonga. *See* United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en.

countries to the principle of sex equality.[35] In addition, numerous regional inter-governmental bodies have announced strong commitments to sex equality.[36]

To combat the problem of statelessness, international conventions and treaties frequently include a right to nationality.[37] The Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights ("ICCPR"), which the United States has ratified. Under the ICCPR, "no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless

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[35] *See* Fourth World Conference on Women, Beijing Declaration and Platform for Action, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995).

[36] European Convention on Human Rights, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 ("The enjoyment of the rights and freedoms shall be secured without discrimination on any ground such as sex."); American Convention on Human Rights, art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 143 ("The States Parties to this Convention undertake to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of sex."); The African Charter on Human and Peoples' Rights, arts. 18.1, 19, June 27, 1981, 1520 U.N.T.S. 217 ("The State shall ensure the elimination of every discrimination against women"; "All people shall be equal; they shall enjoy the same respect and shall have the same rights.").

[37] *See, e.g.*, ICCPR, *supra* note 31, art. 24(3) (promising every child a right to acquire nationality); CRC, *supra* note 31, art. 7(1) (guaranteeing right to acquire nationality).

parents or based on the nationality status of one or both of the parents."[38] The United States has recognized the importance of implementing the ICCPR domestically, stating in Executive Order 13107 that "[i]t shall be the policy and practice of the Government of the United States ... [to fully] respect and implement its obligations under the international human rights treaties to which it is party, including the ICCPR."[39]

Numerous regional treaties include similar provisions.[40] This right to nationality complements the right to equal protection universally found in these treaties.[41] Indeed, in a widely-circulated report, the International Law Association Committee

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[38] Human Rights Committee, CCPR General Comment No.17: Article 24 (Rights of the Child) (Apr. 7, 1989), ¶ 8.

[39] *See* Executive Order 13107, 63 Fed. Reg. 68,991, Implementation of Human Rights Treaties (Dec. 10, 1998).

[40] *See, e.g.*, European Convention on Nationality ("ECN"), art. 4(a), Nov. 6, 1997, 2135 U.N.T.S. 213 ("[E]veryone has the right to a nationality."); American Convention on Human Rights, *supra* note 36, art. 20(1) ("Every person has the right to a nationality."); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) ("Every child has the right to acquire a nationality."); League of Arab States, Arab Charter on Human Rights, art. 29(1), May 22, 2004 ("Everyone has the right to nationality.").

[41] *See, e.g.*, ECN, *supra* note 40, art. 5 ("The rules of a State Party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour, national or ethnic origin.").

on Feminism and International Law argued that where a treaty contains both provisions, they must be read together to prohibit sexual discrimination in the laws awarding nationality.[42] Following completion of this report, the International Law Association issued a resolution calling for the elimination of sex-based preferential treatment in nationality rules, and recommending that in cases where parents are of different nationalities "each parent should have the right to transmit her or his nationality to the child."[43]

When faced with laws that create tension between the rights to citizenship and equal protection, international courts and tribunals have held that sex equality is an inviolable principle that must apply to citizenship law. This international case law establishes that the goal of avoiding statelessness does not trump the goal of sex equality, especially when the statelessness can be minimized without giving preference to one sex over another. For instance, in 1985, the European Court of Human Rights ruled that disparate treatment of men and women in the United Kingdom with respect to the ability of non-citizen spouses to enter and remain in

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[42] *See* International Law Association, Committee on Feminism and International Law, Final Report on Women's Equality and Nationality in International Law, 37 (2000) (analyzing comparative case law and international law on sex equality and citizenship as of 2000).

[43] *See* International Law Association, Feminism and International Law, Res. 5/2000 §§ 3, 7 (July 25, 2000).

the country violated the equal protection clause of the European Convention on Human Rights.[44] The court recognized that "the advancement of the equality of the sexes is today a major goal," and that, accordingly, there must be "very weighty reasons" to justify "a difference of treatment on the ground of sex."[45] The court found that the United Kingdom's argument that the law should pass scrutiny because it gave "more favourable" treatment to a traditionally disfavored group did not qualify as such a reason.[46]

The Inter-American Court of Human Rights came to the same conclusion when it responded to Costa Rica's request for an advisory opinion on its citizenship laws.[47] The proposed Costa Rican law allowed women who married Costa Rican nationals to apply for citizenship, but did not extend the same opportunity to men.[48] Relying on provisions of the American Convention on Human Rights that

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[44] *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) at 83 (1985).

[45] *Id.* at 78.

[46] *See id.* at 82; *see also Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, Communication No. R.9/35, U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981) (sex-based citizenship classification conferring legal rights to foreign wives of Mauritian citizens, but not to foreign husbands, violated the ICCPR's equality provisions).

[47] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 (Jan. 19, 1984).

[48] *Id.* ¶¶ 64-68.

guaranteed equal protection under the law, equality in marriage, and access to nationality, the court directed Costa Rica to remove the specific reference to women so that the law would apply to all foreigners who married Costa Rican nationals.[49]

In November 2014, the U.N. Committee on the Elimination of Discrimination Against Women, which monitors the implementation of CEDAW, adopted General Recommendation No. 32 on the gender–related dimensions of refugee status, asylum, nationality and statelessness of women.[50] The Committee made a number of specific recommendations that States should follow to ensure they do not have discriminatory nationality laws on the basis of sex. The U.N. Working Group on discrimination against women in law and in practice has also highlighted the need for legal reform in its communications to governments regarding their sex-based nationality laws.[51]

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[49] *Id.* ¶ 67; *see also Case of the Yean and Bosico Children v. The Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, at 141 (Sept. 8, 2005) (state authority to determine rights to nationality must be reconciled with principles of equality); Brad K. Blitz, Statelessness, Protection and Equality (2009) (discussing approaches to reconciling statelessness and equality).

[50] Committee on the Elimination of Discrimination Against Women, General Recommendation No. 32, CEDAW/C/GC/32 (Nov. 5, 2014).

[51] *See, e.g.*, Human Rights Council, Communications report of Special Procedures, A/HRC/28/85 (Feb. 19, 2015); Human

The United National Human Rights Council ("HRC") has sought to promote equal rights to nationality. In 2012, the United States led the adoption of a HRC resolution, "The Right to a Nationality: Women and Children."[52] The U.S. State Department promoted this resolution[53] following the launch of a global initiative to promote women's equal right to nationality.[54] In conjunction with this campaign, the U.S. Department of State used its annual Country Reports on Human Rights Practices to raise human rights concerns about other nations with sex-based nationality laws.[55]

In 2016, the United States and a core group of countries introduced a resolution, "The Right to a Nationality: Women's Equal Nationality Rights in Law and in Practice,"[56] which calls on all

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Rights Council, Report of the Working Group, A/HRC/29/40, ¶ 5 (Apr. 2, 2015).

[52] *See* Human Rights Council Res. 20/4, 20th Sess., June 18 – July 6, 2012, A/HRC/RES/20/4 (July 16, 2012).

[53] *See* Press Release, U.S. Dep't of State, The Right to a Nationality: Women and Children Human Rights Council: 20th Session (July 5, 2012).

[54] *See* U.S. Dep't of State, Bureau of Population, Refugees, and Migration, Fact Sheet, Women's Nationality Initiative (Mar. 8, 2012).

[55] *See, e.g.*, U.S. Dep't of State, Equatorial Guinea 2015 Human Rights Report (the country's civil code discriminates against women in the area of nationality).

[56] *See* Press Release, U.S. Dep't of State, Key U.S. Outcomes at the U.N. Human Rights Council 32nd Session (July 6, 2016).

governments to ensure gender equal nationality rights in compliance with States' obligations under international law. The adopted resolution "[u]rges all States to refrain from enacting or maintaining discriminatory nationality legislation" and to "take immediate steps to reform nationality laws that discriminate against women by granting equal rights to men and women to confer nationality on their children."[57] The resolution was ultimately co-signed by more than 100 countries.[58]

### B. National Supreme Courts Have Repeatedly Recognized the Importance of Sex Equality in Citizenship Laws

The case at bar presents a specific question regarding the citizenship status of a child born out of wedlock outside the United States to a citizen father, and raises the more general question of when, if ever, sex-based classifications are a defensible component of the nation's citizenship laws. This brief canvasses the conclusions and reasoning of foreign jurists who have addressed this general question in their own domestic contexts. In total, *amici* have identified eleven supreme courts – the highest courts of their respective nations – that have

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[57] Human Rights Council Res. 32/7, 32nd Sess., June 13 – July 8, 2016, A/HRC/RES/32/7 (July 18, 2016).

[58] *See* U.S. Dep't of State, *supra* note 56.

issued rulings of this type in the past four decades.[59] All but one of these courts rejected the use of sex-based classifications to limit citizenship rights. Many of the courts rejecting sex-based classifications used the strongest possible terms to criticize the distinctions. The reasoning of these jurists sounds a number of themes that resonate with the case at bar.

### 1. All Non-U.S. Supreme Courts Ruling in Recent Decades, Save One, Have Recognized the Presumptive Importance of Sex Equality in Citizenship Laws

All of the national supreme courts identified by *amici* that have addressed sex-based citizenship laws have, with the exception of Egypt, found that the important legal norm of equality overrides competing concerns offered to justify sex-based classifications. For example, when the Supreme Court of Canada struck down a law providing that children born abroad to a Canadian mother would be subjected to a security check and an oath when seeking citizenship, while those born abroad to a Canadian father would not, it reviewed the classification under its constitutional guarantee of equality protection and equal benefit of the law "without discrimination based on . . . sex."[60] The

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[59] The supreme court (or equivalent) cases identified by *amici* are from Austria, Benin, Botswana, Canada, Egypt, Germany, Italy, Japan, Nepal, Scotland and Zimbabwe.

[60] *Benner v. Canada (Sec'y of State)*, [1997] 1 S.C.R. 358, ¶ 10 (Can.).

parties and the court readily accepted that "establishing a commitment to Canada and safeguarding the security of its citizens" were "pressing" and "substantial" governmental objectives.[61] Yet the justices concluded that the law was irrational.[62]

According to the court, "the gender of a citizenship applicant's Canadian parent has nothing to do with the values of personal safety, nationbuilding or national security underlying the Citizenship Act."[63] The court was particularly concerned about the immutable nature of the classification, noting that the strict application of equality principles is critically important when access to citizenship is restricted based on factors "so completely beyond the control of an applicant as the gender of his or her Canadian parent."[64] The court equalized treatment of mothers and fathers by extending the less onerous standards to Canadian mothers and declared the sex-based statutory provisions to be without force or effect.[65]

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[61] *Id.* ¶ 94.

[62] *Id.* ¶¶ 95-101.

[63] *Id.* ¶ 67. The Canadian Supreme Court summarily rejected the claim that the remeliorative nature of the challenged legislation, which provided more generous citizenship provisions to women than earlier laws, would insulate the sex-based classifications from review. *Id.* ¶ 75.

[64] *Id.* ¶ 85.

[65] *Id.* ¶¶ 1, 103.

Likewise, in 2008, the Supreme Court of Japan struck down a sex-based classification affecting the ability of out-of-wedlock children to acquire Japanese citizenship.[66] Specifically, the challenged law provided that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth could acquire Japanese nationality only if the parents married.[67] No such marriage requirement was imposed on the out-of-wedlock child of a Japanese mother and a non-Japanese father.[68]

The Japanese high court credited the importance of ensuring ties between the out-of-wedlock child and Japan, noting that the sex-based provisions might have contributed to this purpose in the past.[69] However, the court concluded that this antiquated rationale was insufficient to uphold discriminatory provisions in contemporary times, in light of the Japanese constitution's equality guarantee. As the majority stated, many other nations are "moving toward scrapping discriminatory treatment by law against children born out of wedlock," and "the realities of family life

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[66] Saikō Saibansho [Sup. Ct.] June 6, 2008, Hei 6 (Gyo-Tsu) no. 135, 62 Saikō Saibansho Minji Hanreishū [Minshū] Majority § 2 (Japan) (discussing Japanese Constitution, art. 14, ¶ 1) (translated at http://www.courts.go.jp/app/hanrei_en/detail?id=955).

[67] *Id.* § 4(2)(a).

[68] *Id.* § 4(2)(d).

[69] *Id.* § 4(2)(a), (b).

and parent-child relationships have changed and become diverse."[70] Justice Izumi's concurrence, addressing sex equality as well as birth status discrimination, added that in light of these societal changes, this law seemed to be based on a "stereotyped and rigid way of thinking."[71] The court concluded that the distinction in the statute did not demonstrate the "reasonable relevance" necessary to pass constitutional muster.[72] The court excised the marriage requirement from the statute, thereby equalizing the derivative citizenship standards for Japanese fathers and mothers and granting citizenship to the appellant before the court.[73]

In 1974, the Federal Constitutional Court of Germany struck sex-based nationality laws that precluded German mothers, but not fathers, from transmitting citizenship to their children.[74] The German government argued that abolition of sex-based classifications would lead to more instances of dual citizenship, a status deemed legally problematic at the time. The court rejected this justification, concluding that it was not sufficiently compelling to

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[70] *Id.* § 4(2)(c).

[71] *Id.* at Izumi Concurrence § 3.

[72] *Id.* at Majority § 4(3).

[73] *Id.* § 5(2).

[74] Bundesverfassungsgericht (BverfG) (Federal Constitutional Court) May 21, 1974, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 217 (Ger.).

warrant overriding constitutional equality principles.[75]

In 1983, the Italian Constitutional Court also invoked constitutional equality principles to strike down a 1912 law providing that the child of a male Italian citizen was an Italian citizen by birth but making no such provision for the child of a female Italian citizen.[76] As in Germany, the government argued that sex-based citizenship classifications were necessary to avoid dual nationality. The court concluded, however, that the constitutional principle of equality took precedence, despite the inconveniences caused by dual nationality.[77]

The highest court of Botswana also deemed irrational a law that conditioned the citizenship of a child born in Botswana to married parents solely on the citizenship of the child's father, regardless of the mother's citizenship.[78] In reaching this conclusion, the court determined that the Botswana Constitution guaranteed equal protection on the basis of sex – citing as a model the jurisprudence of the United States construing our own Equal Protection Clause.[79] The court concluded that the

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[75] *Id.*

[76] Corte Costituzionale, 28 Gennaio 1983, Giur. it. 1983, I, 91 (It.).

[77] *Id.*

[78] *Attorney General v. Unity Dow*, (1992) 103 I.L.R. 128, 131 (Bots.).

[79] *Id.* at 132 (citing *Craig v. Boren*, 429 U.S. 190 (1976)).

discriminatory provisions burdening mothers were *ultra vires* and equalized the provisions by extending the rules applicable to fathers.[80]

Four other high courts have reached similar conclusions. In 1995, the Zimbabwe Supreme Court found that a sex-based classification impinging on women's citizenship rights, *i.e.*, the denial of the right to live in Zimbabwe after marrying an alien, violated the nation's constitutional equality principle.[81] Likewise, the Supreme Court of Nepal issued a writ of mandamus to preclude government enforcement of a provision that dictated different treatment as between citizen men and citizen women when transmitting visa rights to their spouses.[82]

In 2014 Benin's highest constitutional court found unconstitutional provisions of the nationality code that imposed sex-based rules on parents seeking to pass on their nationality to their children. According to the court, the provisions constituted flagrant violations of the non-discrimination principles in Benin's constitution.[83]

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[80] *Id.* at 134.

[81] *Rattigan and Others v. Chief Immigration Officer*, 1995(2) SA 182 (ZS) (Zim.).

[82] *Meera Gurung v. Her Majesty's Gov't, Dep't of Central Immigration, Ministry of Home Affairs*, Dec'n No. 4858 2051, ¶ 14 (S. Ct. 1994) (Nepal).

[83] *Benin Constitutional Court Decision*, DCC 14-172 (Sept. 16, 2014).

Finally, in 2016, the highest tribunal in Scotland construed 2009 revisions to the British nationality law so that a child born abroad of a mother of British descent could gain citizenship on an equal basis as a child born in the United Kingdom to a mother of British descent. As the court stated in construing the law, the 2009 revisions were intended as "an antidote to nationality law's long-standing gender discrimination," in conformity with the United Kingdom's international obligations under CEDAW. The court concluded that it should not assume that the legislature "intended to reintroduce aspects of gender discrimination previously discarded."[84]

*Amici* have identified only one foreign supreme court that has upheld sex-based classifications in recent decades. In June 2010, the Supreme Administrative Court of Egypt upheld a law that established a process for stripping the citizenship of Egyptian men who marry Israeli women in circumstances where the government determined that the marriage raised a threat of foreign spying.[85] This case, however, is aberrational, given the deep and long-standing tensions between the two countries and the fact that Egyptian nationality law has generally bent toward equality. Egyptian law was amended in 2004 to allow married

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[84] *Romein v. Adv. General for Scotland*, [2016] CSIH 24 (Scot.).

[85] Cairo Court Rules on Egyptians Married to Israeli Women, BBC News, June 5, 2010.

Egyptian women the same right as married men to pass their nationality to their children in conformity with the Egyptian Constitution.[86]

The Egyptian restriction on citizenship of those who marry foreigners is not entirely alien to U.S. law; American women faced restrictions on marriage to non-citizens almost a century ago, for similar reasons.[87] While those particular restrictions were repealed in 1922, the sex-based classifications that remain a part of U.S. citizenship law, and that are challenged here, are a legacy of that period.[88]

### 2. National Supreme Courts Have Determined that the Judiciary Can Properly Require Sex Equality in Citizenship Laws

Recognizing the importance of citizenship criteria to sovereign identity, a number of national courts have grappled with the question of the

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[86] Law No. 154 of 2004 (To Amend Provisions of Law No. 26 of 1975 Concerning Egyptian Nationality) Al-Jarida Al-Rasmiyya, 26 July 2004 (Egypt).

[87] *See, e.g., Kerry v. Din*, 135 S. Ct. 2128, 2135-36 (2015) (Scalia, J., plurality opinion) ("Modern equal-protection doctrine casts substantial doubt on the permissibility of such asymmetric treatment of women citizens in the immigration context, and modern moral judgment rejects the premises of such a legal order."); *Miller v. Albright*, 523 U.S. 420, 463-64 (1998) (Ginsburg, J., dissenting).

[88] *Miller*, 523 U.S. at 463-68 (Ginsburg, J., dissenting); *Nguyen v. INS*, 533 U.S. 53, 89 (2001) (O'Connor, J., dissenting).

judicial role in reviewing citizenship laws. The supreme courts that have squarely addressed this issue have concluded that the judiciary has an important role to play in enforcing equality norms, and that the court can serve that function without impinging on legislative authority over citizenship.

The issue of the court's role was addressed by the Japanese Supreme Court. There, the court noted that criteria for acquiring nationality are generally left to the legislature, which is in a position to take into account a range of social and political issues.[89] However, wrote the court, any law that "amounts to discriminatory treatment without reasonable grounds" should be subject to constitutional scrutiny by the courts.[90] The court proceeded to characterize Japan's sex-based nationality law as an unreasonable exercise of legislative power and excised the provision imposing a greater burden on men.[91]

The Court of Appeal of Botswana was similarly explicit in addressing the parameters of judicial review. In considering the constitutionality of the sex-based provision of the Botswana Citizenship Act, the court observed that "[w]here the legislature is confronted with passing a law on citizenship, its only course is to adopt a prescription which complies with the imperatives of the

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[89] 62 Minshū at Majority, *supra* note 66, § 4(1).

[90] *Id.*

[91] *Id.* § 5(1).

Constitution, especially those which confer fundamental rights to individuals in the State."[92] Finding that the sex-based approach taken by the legislature was irrational, the court held the citizenship law to be ultra vires under the Constitution.[93]

Finally, the Supreme Court of Nepal noted that under the language of its constitution, decisions regarding citizenship are generally left to the discretion of the executive body of the government.[94] However, where the government policy violated a constitutional provision, the court opined, "there should be reasonable cause" to support the policy.[95] The court concluded that the sex-based law at issue did not meet even the minimal test of reasonableness.

The international community has committed to both sex equality and the elimination of statelessness, and has determined that the former must not be sacrificed for the latter. Nor can restrictive citizenship laws, such as the law in question here, be justified on the grounds that they give a preference to women. This Court, therefore, should follow and adhere to the growing

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[92] *Unity Dow*, *supra* note 78, at 139.

[93] *Id.* at 158.

[94] *Meera Gurung*, *supra* note 82, ¶ 14.

[95] *Id.*

international consensus for equal protection under nationality law.

## CONCLUSION

The judgment of the Second Circuit should be affirmed.

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# Appendix

## APPENDIX

**Equality Now** is an international human rights organization working for the protection and promotion of the rights of women and girls worldwide with a membership network of individuals and organizations in over 190 countries. Equality Now is a co-founder and steering committee member of the Global Campaign for Equal Nationality Rights, a coalition advocating for international action to reform laws in countries where women are prevented from passing their nationality to their children or spouses on an equal basis with men. Since 1999, Equality Now has highlighted in its reports on sex discriminatory laws the need for 8 U.S.C. §§ 1401 and 1409 to be amended. This would be in accordance with the commitment made by the U.S. government, together with other governments, in ¶ 232(d) of the Platform for Action, Report of the Fourth World Conference on Women, Beijing, Sept. 4-15 1995, U.N. Doc. A/CONF.177/20, resolution I, Annex II, to revoke laws that discriminate on the basis of sex. Equality Now submitted a brief with other organizations as *amici* curiae in support of petitioners in *Flores-Villar v. United States*, 564 U.S. 210 (2011), which challenged the constitutionality of 8 U.S.C. §§ 1401(a)(7) and 1409 with regard to the different sex-based residency requirements for unmarried fathers and unmarried mothers in transferring their citizenship to their children born overseas, as well as in support of petitioners in *Nguyen v. INS*, 533 U.S.

53 (2001) which challenged the constitutionality of 8 U.S.C. § 1409, based on international law and emerging customary international law.

**Arab Women Organization (AWO)** is a women's rights organization working for the promotion of the rights of women and girls with a membership network that includes 88 women's community based organizations (CBOs). AWO is working for the abolishment of discrimination in the Jordanian Nationality Law, and the lifting of the reservation on Article 9 paragraph 2 of CEDAW, in order for citizenship to be granted to spouses and children born to Jordanian mothers married to non-Jordanians. AWO has been working for gender equality and women's rights since 1970.

**Human Rights Watch (HRW)** is an independent nongovernmental organization that monitors and reports on human rights issues in more than 90 countries around the world. Established in 1978, Human Rights Watch conducts fact-finding research, exposes human rights abuses, and undertakes advocacy to press for changes in policy and practice that promote human rights. Its work is guided by international human rights and humanitarian law, and respect for the dignity of each human being. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals, including on the issues of nationality and citizenship.

**The Institute on Statelessness and Inclusion (ISI)** is an independent non-profit organization based in the Netherlands committed to promoting the human rights of stateless persons and fostering inclusion to end statelessness. ISI works to promote the inclusion of the stateless and disenfranchised through research, education, partnership and advocacy on a number of thematic priorities including gender equality. ISI is a member of the steering committee of the *Global Campaign for Equal Nationality Rights* which aims to eliminate gender discrimination in nationality laws. ISI has engaged in international advocacy on gender equality in nationality laws through submissions to United Nations bodies, including the Committee on the Rights of the Child, the Committee on the Elimination of All Forms of Discrimination against Women and the Universal Periodic Review of the Human Rights Council, in collaboration with the Global Campaign and other partners. ISI has also researched and analyzed how these bodies address the problem of gender discrimination in transmission of nationality. At the national level, ISI has engaged in research, advocacy and capacity building in a number of countries as well as developing the capacity of national organizations to work on this issue through global and regional training courses on statelessness.

**The International Women's Development Agency (IWDA)** is the leading agency in Australia working on women's rights and gender equality in

the Asia Pacific. Over a thirty-year history IWDA has worked with 194 program partners across 36 countries and territories. Today we focus our partnership work in countries across Asia Pacific and collaborate on research, advocacy and policy through national, regional or global platforms and coalitions. Our work seeks to promote changes in policy and practice towards gender equality and full realisation of women's rights, and to support and enable women as agents of this change.

**The Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM)**, founded in 1987, is a feminist regional network of individuals and non-governmental organizations based in Lima, Peru with affiliates in fifteen countries working for the full enjoyment of women's rights, based on principles of equality and non-discrimination, among others. CLADEM has had consultative status with the United Nations since 1995 and was authorized to take part in activities at the Organization of American States in 2002, and has had consultative status with UNESCO since 2009. CLADEM promotes the development and adoption of international and regional human rights instruments, and it holds governments accountable for the lack of implementation of women's human rights standards by submitting reports as well as filing strategic litigation cases at the national and international levels. In March 2009, CLADEM was awarded the

King of Spain Human Rights Prize and the Gruber Prize in 2010.

**Lawyers for Human Rights** is a human rights organisation based in South Africa. The organization runs a Statelessness Project through its Refugee and Migrant Rights Programme. It advocates for equal nationality rights and provides direct legal services to stateless persons or those at risk of statelessness. It has conducted strategic litigation on statelessness in South Africa since 2011 and has a 36 year track record of assisting clients to access their rights through the courts.

**Questions de Femmes** is an association that works for the promotion and protection women's rights in Togo. It is comprised of advocates who put forward their legal expertise for the benefit of women, especially women who do not have the means to pay for legal services. Questions de Femmes collaborates with associations and NGOs in Togo who channel to Questions de Femmes cases of women's rights violations that require legal intervention. It enjoys recognition in judicial circles in Togo as it seeks to work towards ensuring access to justice by all.

**Tafawuq Center for Women and Gender** is an organization based in Bahrain that strives to work in partnership with civil society organizations to raise women's awareness about their human rights and to shed light on the reasons that hamper the development of the situation of women and their

enjoyment of full citizenship. This is done through: organizing workshops and discussion loops; organizing public campaigns; showing related movies and having discussions; preparing research studies and data; writing programs and preparing reports; using various social media to highlight women's issues; and partnering and exchanging experiences with national, regional and international organizations.

**The Women's Refugee Commission (WRC)** improves the lives and protects the rights of women, children and youth displaced by conflict and crisis. WRC researches their needs, identifies solutions and advocates for programs and policies to strengthen their resilience and drive change in humanitarian practice. Since its founding in 1989, WRC has been a leading expert on the needs of refugee women and children, and the policies that can protect and empower them. Recognizing the significant impact of discriminatory nationality laws on displaced women and children and as a root cause of statelessness, WRC advocates for gender-equal nationality laws through the Global Campaign for Equal Nationality Rights, an international coalition of national, regional, and international NGOs housed at WRC.

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In the

# Supreme Court of the United States

LORETTA LYNCH,
ATTORNEY GENERAL OF THE UNITED STATES,
*Petitioner*,

v.

LUIS RAMON MORALES-SANTANA,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF AMICI CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND THE NORTHWEST IMMIGRANT RIGHTS PROJECT IN SUPPORT OF RESPONDENT

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## INTEREST OF THE AMICI CURIAE

*Amicus* National Immigrant Justice Center (NIJC) is a non-profit agency that represents individuals regarding citizenship and immigration matters. Together with over 1500 pro bono attorneys, NIJC represents thousands of individuals annually, including individuals seeking determinations that they or their children have acquired citizenship at birth.[1]

*Amicus* American Immigration Lawyers Association (AILA) is a national organization comprised of more than 13,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a pro bono basis.

Amicus Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the legal rights of noncitizens in the United States with respect to their immigrant status. NWIRP provides direct rep-

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[1] Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than Amici and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to this filing have been submitted to the Clerk.

resentation to low-income immigrants in removal proceedings and before the federal courts. NWIRP also provides representation, workshops and legal advice to low-income immigrants in detention.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Amici are experts in citizenship law, and offer this brief to clarify and correct several points addressed in the Government's opening brief.

First, the Government seeks to downplay the equal protection problems with the statute by noting that Respondent might have mooted the issue by naturalizing. This is unresponsive to the issue before the Court: Naturalization is not cheap, particularly for the poor and working class. Naturalization is not simple; the form is lengthy and complex. Naturalization is not foolproof: forms can be misfiled or lost, applications can be delayed or abandoned. The naturalization route implicates a host of issues that are not implicated by at-birth citizenship. It is not equal to at-birth citizenship, which guarantees that children of U.S. citizens will be recognized as Americans in their adulthood.

Second, the Government is incorrect when it suggests that eliminating distinctions between fathers and mothers would disadvantage some applicants. Even if the Government's cramped reading of "continuous" were correct—and Amici explain that it is not—it would not disadvantage anyone because the possibility of acquiring citizenship under 8 U.S.C. § 1409(c) (1958) does not exclude potential acquisition of citizenship under other provisions. The Government also complains of the remedy ordered, but instead of offering different language, it seeks to

use that as an opening to leave Mr. Morales-Santana without a remedy. To the extent that the holding below would do more than intended, a simple clarification would solve any problems.

Third, the Government expends pages addressing naturalization authority without acknowledging that under the statutory definition of naturalization, at-birth citizenship is not a type of naturalization. For purposes of the Immigration and Nationality Act (INA), naturalization is defined to exclude citizenship at birth. Any limitations by Congress on judicial authority in the "naturalization" context are inapposite to this case because the plain text of the statute makes them applicable only to citizenship granted after birth.

Fourth, the Government's argument overlooks crucial functions played by at-birth citizenship statutes. These statutes respect the dignity of U.S. citizen parents by treating their children as automatic citizens from the day of their birth. The direct effect of this approach is to guarantee that the child will not be subject to deportation and will always be acknowledged as an American. U.S. citizen parents can rest easy knowing that whatever other difficulties may befall their children, they will not be deprived of their U.S. citizenship.

Finally, Amici draw the Court's attention to a separate citizenship statute, 8 U.S.C. § 1432 (1958),[2] which, though not directly relevant here, provides additional evidence that § 1409(c) was motivated by impermissible gender stereotypes. Section 1432

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[2] The immigration statutes have been repeatedly amended. For consistency's sake, Amici cite to the statute as in effect in 1958, unless otherwise noted.

granted automatic citizenship after birth to individuals when a parent or parents naturalized and when the child was present in the United States as a permanent resident. The current statutory incarnation, 8 U.S.C. § 1431 (2015), is gender-neutral. The statute applicable at the time of Respondent's minority, however—enacted simultaneously with §1409(c)—granted automatic citizenship after birth more favorably to children of unmarried U.S. citizen mothers than to children of unmarried U.S. citizen fathers. An unmarried father was unable to convey citizenship through former § 1432 unless the child's mother was deceased. This related section offers further evidence that the statute at issue here impermissibly discriminates on the basis of gender stereotypes.

## ARGUMENT

This brief addresses and refutes several points made by the Government in attempting to minimize the harm engendered by the statute or to problematize the remedy appropriately selected by the lower court.

### I. Naturalization is Complicated, Costly, and Subject to Various Obstacles; At-Birth Citizenship is Automatic and Foolproof.

The Government suggests, in essence, that any unequal treatment based on gender would be harmless if the children of citizens made prompt use of the general naturalization statutes and never got into trouble. Congress, argues the Government, "cannot be faulted if petitioner did not seek to take advantage" of the opportunity to naturalize once he became an adult. Pet. Br. 48.

The Government's argument misses the point. Whatever Respondent might have done in his late teens or twenties—decades after the equal protection claim arose—is irrelevant to whether his father's constitutional rights were violated.

The availability *vel non* of naturalization eligibility does not place a citizen father in the same position as a citizen mother. The child of an unmarried citizen father must overcome numerous hardships and burdens that are not faced by those who acquire citizenship at birth. The naturalization application process is complicated and costly. The application may be lost, or adjudication delayed. An applicant, commonly unrepresented, may make mistakes which prevent or postpone citizenship. In the meantime, the consequence of any error may be loss of rights and deportation.

At-birth citizenship guarantees that children of U.S. citizens will be recognized as Americans without regard to unknown future events. It provides a father or mother with certainty that—barring an intentional, volitional choice to renounce citizenship, *Afroyim v. Rusk*, 387 U.S. 253 (1967)—their child will never be excluded from this country. Naturalization, by contrast, is not automatic and does not place children of unmarried citizen fathers in an equivalent position to the children of unmarried citizen mothers.

### A. Naturalization is Complex and Costly.

The fee for naturalization (not including attorney fees) is currently $680. *See* USCIS, *Instructions for Application* for Naturalization 14 (Mar. 26, 2016). That amount represents almost two weeks of salary for the average American. Bureau of Labor Statis-

tics, Real Earnings – August 2016, USDL-16-1829 3 (Sept. 16, 2016). Indeed, naturalization fees have increased 716% in the past 18 years, far in excess of the rate of growth of wages. *See* MIGRATION POLICY INSTITUTE, IMMIGRATION FEES IN CONTEXT (Feb. 2007).

Moreover, the naturalization application has become increasingly burdensome and complicated. The form instructions are 18 pages. *See* USCIS, *Instructions for Application for Naturalization*, *supra*. The naturalization form itself is 20 pages long. USCIS, *Application for Naturalization* (Mar. 26, 2016). The naturalization form requires an applicant to provide a plethora of information. The form asks for detailed employment history going back several years. *Id.* at 6. It requires an applicant to list all trips outside the United States for the past five years, and to include the total number of days outside the U.S. and the countries visited. *Id.* at 7. To complete the form conscientiously requires many hours and is often impossible in a single sitting.

Moreover, several questions are ambiguous or legally complex. Notably, Part 12 of the form asks a series of 91 questions, many of them complex and compound in nature, regarding many aspects of the applicant's background. *Cf.* 81 AM. JUR. 2D *Witnesses* § 714 (2008) ("The vice of the compound question is generally recognized"). For instance, one of those 91 questions requires the applicant to list "any organizations, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world," which the applicant has ever been "a member of, involved in, or associated with." Application for Naturalization, *supra*, 12. Failure to fully and accurately answer these ques-

tions may delay adjudication or subject the applicant to allegations of misrepresentation. *Cf. Kungys v. United States*, 485 U.S. 759, 767 (1988) (in denaturalization context).

And filing a naturalization application implicates far more than time and money. The Federal Reporter is littered with examples of individuals who have been placed into removal proceedings as a result of applying for naturalization. To pick an example, Paul Kiorkis is an Assyrian Christian who immigrated lawfully with his parents and siblings, but had one misdemeanor drug conviction resulting in probation. After seeking to become a citizen like the rest of his family, his drug possession offense came to light, he was placed into removal proceedings and denied all relief. *See, e.g., Kiorkis v. Holder*, 634 F.3d 924, 927 (7th Cir. 2011), as amended (Mar. 10, 2011). An applicant for naturalization places their legal status (and life as they know it) at risk.

Unfortunately, many individuals are not in a position to hire an attorney to guide, advise, and represent them in seeking citizenship. The average income for recent lawful entrants is substantially less than for Americans generally. *See* JEFFREY S. PASSEL AND D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 12 (Pew Research Ctr., Apr. 14, 2009). It is the experience of Amici that a substantial number of individuals in the position of Respondent and his father cannot easily afford counsel.

Recognizing these barriers to naturalization, several states and private funders have acted to subsidize legal counsel to individuals seeking to naturalize; some have even made loans available to help with naturalization filing fees. ADAM HUNTER AND

KARINA SHKLYAN, THE PEW CHARITABLE TRUSTS, THE STATE OF THE STATES ON NATURALIZATION (July 14, 2016) available at http://bit.ly/2cR7fle. These laudable efforts help many thousands of people annually, and advance the national interest by binding these hardworking individuals ever more closely to this country, culminating in an oath to protect it. But these programs exist only in a minority of states and (due to funding limitations) cannot help everyone even in those states.

### B. Even Properly Filed Naturalization Applications Can Be Delayed, Lost, or Never Adjudicated.

Moreover, unlike automatic citizenship from birth, naturalization applications are subject to the vagaries of delay, loss, and abandonment. Even where an individual has filed a proper application for naturalization, in the right location, with the right fee, and where the individual is not barred from naturalization, there is no guarantee that the application will be adjudicated to completion.

Sometimes, a naturalization application may simply be lost by the agency, and thus not adjudicated. For instance, Hector Duran-Pichardo sought naturalization after 16 years as a permanent resident, during which time he was married and had two citizen children. *Duran-Pichardo v. Att'y Gen. of U.S.*, 695 F.3d 282, 283 (3d Cir. 2012). After passing his naturalization examination, he was told to await an oath ceremony. *Id.* Unfortunately, his file was mislabeled and partly lost. Id. Ten years passed without adjudication, despite his multiple attempts to move the process forward. *Id.*

Naturalization applications can be subject to delay even where the file is not mislaid or lost. Indeed, delays in this context are common enough that Congress created a special cause of action allowing naturalization applicants to go into federal court to remedy naturalization delay. 8 U.S.C. § 1447(b); *see Walji v. Gonzales*, 500 F.3d 432, 435 (5th Cir. 2007) (collecting cases).

Where applications are mislaid or delayed, other problems multiply. If an address change goes awry, the applicant will not receive notice of interviews, resulting in further delay or even closure of the file. *Contreras-Rodriguez v. U.S. Att'y Gen.*, 462 F.3d 1314, 1315 (11th Cir. 2006). Even where the applicant attends their naturalization interview and passes the examination on U.S. history and English, the application will be approved, but the process requires one more step: a public oath ceremony. Until an individual takes a public oath, they do not obtain citizenship. *Duran-Pichardo*, 695 F.3d at 283.

As with most aspects of immigration law, the problem is exacerbated by the high rate of pro se applications. This can lead to simple procedural errors. An unrepresented individual might file a change of address form with the wrong branch or at the wrong address. *Cf. Thongphilack v. Gonzales*, 506 F.3d 1207, 1210 (10th Cir. 2007) (noncitizen removed in absentia despite orally advising court of new address, friend failed to deliver written address change); *Terezov v. Gonzales*, 480 F.3d 558, 562 (7th Cir. 2007) (noncitizen failed to keep copy of change of address form, had proof of receipt of a mailing). Lack of counsel is even more significant where the case involves some legal complexity or would require federal court litigation to address delays. 8 U.S.C. § 1447(b).

The point is not that the system is in need of reform—though it is—but simply that it is not foolproof. Some applicants will slip through the cracks.

### C. At-Birth Citizenship Eliminates These Risk Factors.

As shown, it is in the nature of the naturalization process that some young people will be delayed in filing an application, while others will file but not complete the process. Some young people will fail to become citizens at the first opportunity, placing their futures and their family's unity at risk. A young person, busy pursuing an education, falling in love, finding a job, supporting her parents, watching out for siblings, or simply in making a life for herself, will not always prioritize naturalization above all else. Meanwhile, this approach leaves the child's citizenship in suspense throughout minority, diminishing the father's rights as a citizen and refusing to accord his child the same respect given to the children of other Americans.

Failure to become a citizen can place at risk the child's right to reside in the United States. A noncitizen is always subject to removal from the United States. Removal proceedings may be triggered by brushes with the law; minor offenses punishable by probation or fines, may nevertheless trigger removal. *See generally* 8 U.S.C. § 1227(a)(2); *cf. Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2583 (2010) (noting that individual was removable although not aggravated felon). But the consequences of a lack of citizenship are wide-ranging. A permanent resident may not take up residence abroad without abandoning her residence. *See Matter of Huang*, 19 I&N Dec. 749, 753 (BIA 1988). Even work for an American company abroad can trigger abandonment and re-

quires an individual to take steps to preserve their residence. *Cf.* 8 C.F.R. § 223.1(a) (allowing resident to seek reentry permit); 8 U.S.C. § 1427(b) (allowing some employees to preserve residence for naturalization purposes). Permanent residents may be hindered from applying for certain kinds of employment or for security clearances. *See* USA Jobs: Employment of non-citizens, https://www.usajobs.gov/Help/working-in-government/non-citizens/ (last visited Sept. 30, 2016). And of course, a noncitizen cannot vote in American elections. 18 U.S.C. § 611.

At-birth citizenship does not subject the precious right of citizenship to these vicissitudes. It is in the nature of the at-birth citizenship that citizenship adheres automatically and without regard to any procedural missteps. Individuals who acquire citizenship at birth are able to obtain a certificate upon application at any point, after taking the oath of allegiance. 8 C.F.R. § 341.5(b). The Second Circuit's approach guarantees an unmarried citizen father the same assurance that his child will be recognized as an American as is given to unmarried citizen mother. This approach give due weight to the citizenship rights of the father, and protects the interest in family unity.

## II. The Government Incorrectly Suggests that Eliminating Distinctions Based on Gender Would Work to Disadvantage Applicants.

Not only does the Government downplay the importance of at-birth citizenship by ascribing a child's failure to obtain citizenship to their failure to naturalize, it also improperly tries to turn the problem on its head, suggesting that eliminating gender distinctions would disadvantage other applicants. The Gov-

ernment's point turns on some minor language in the remedy ordered by the Court of Appeals, turning that minor point into an argument against any remedy at all. The Government argues that the one-year physical presence requirement in § 1409(c) must be "continuous," whereas § 1401(a)(7) applied to a "period or periods" of physical presence, which could thus be discontinuous.

The point is incorrect, irrelevant, and theoretical. It is incorrect because *INS v. Phinpathya*, 464 U.S. 183 (1984) does not require courts to treat the continuity requirement in § 1409(c) as broken by any departure no matter how brief. The point is irrelevant because the Government concedes (as it should) that § 1409(c) is not exclusive to acquisition of citizenship under § 1401(a)(7). That is, even if a case could be found in which a parent could meet the § 1401(a)(7) requirement but not the § 1409(c) requirement, the child would still be a citizen. Moreover, the Government's point is purely theoretical; the Government can point to no individual ever found to have acquired over ten years of cumulative physical presence who was not also continuously present for one year at some point prior to a child's birth.

In the end, the Government is not arguing that the *statutory scheme* turns the remedy into a double-edged sword, but rather that language in the lower court's opinion appears to make its remedy exclusive. The Government overreads that language, but the solution, if one were required, would be simply to clarify the remedy.

### A. *Phinpathya* ought not be imported to this context.

The issue in *Phinpathya* was whether the continuous physical presence requirement for Suspension of Deportation under 8 U.S.C. § 1254(a)(1) (1984) was properly understood to permit brief, casual, and innocent departures. Ms. Phinpathya was an "*unlawful* alien who could have been deported even had she remained in this country," who had no "statutory right to remain in this country." 464 U.S. at 195 (emphasis in original). The Court declined to adopt the "generous" and "liberal" reading urged by Ms. Phinpathya. *Id.* at 192. Justice Brennan, concurring, agreed that the brief, casual, and innocent standard ought not be imported from *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), to the Suspension context. *Phinpathya*, 464 U.S. at 196. He wrote separately to disagree with language in the majority which "seems to imply that Congress intended the term 'continuous' ... to be interpreted literally." *Id.* at 196-97.

In the wake of *Phinpathya*, agency precedent found that the term "continuous physical presence" must be read to preclude any absences unless the statute provided for exceptions to the continuity requirement. *Matter of Graves*, 19 I&N Dec. 337 (Comm. 1985).

Two years after *Phinpathya*, Congress legislated to overrule that decision. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(b)(3) 100 Stat. 3359, 3439-40. The new provision provided that "[a]n alien shall not be considered to have failed to maintain continuous physical presence in the United States... if the absence from the United States was brief, casual, and innocent and did not

meaningfully interrupt the continuous physical presence." 8 U.S.C. § 1254(b)(2) (1986). However, the new provision was located in the section pertaining to Suspension of Deportation, the remedy at issue in *Phinpathya*. The agency thereafter found that the new statute did not apply outside the Suspension context. *Matter of Copeland*, 19 I&N Dec. 788, 789 (Comm'r. 1988).[3] *Copeland* held explicitly as Justice Brennan feared: "Any departure from the United States *for any reason or period of time* bars a determination that an alien has been continuously physically present." *Id.* (emphasis added). The Agency explicitly found its hands tied: "in light of the Supreme Court's strict literal interpretation of *Phinpathya*, ... the Service is bound to follow the plain language of section 316(b)." *Id.* at 790.[4]

Ironically, "continuous physical presence" is not understood literally in the context of the undocumented, though *Phinpathya* was premised in part on the Court's conclusion that Congress wanted to be

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[3] The statute at issue in *Copeland* allows employees of the U.S. government, U.S. research institutions, and specified other employers to "preserve" their residency despite being assigned abroad. 8 U.S.C. § 1427(b). (Mr. Copeland, a British national, had been sent to Korea. 19 I&N Dec. at 789.).

[4] This is not the only instance of the immigration agencies treating a decision of this Court in one context as binding in another. In *Negusie v. Holder*, 555 U.S. 511, 518 (2009), for instance, the agency applied the Court's decision in *Fedorenko v. United States*, 449 U.S. 490, (1981), to a different statute in a different context. The agency did not understand that context mattered: "the BIA ... adopted wholesale the *Fedorenko* rule" and found it to "'mandate[] a literal interpretation'" which excluded the possibility of a duress exception. *Negusie*, 555 U.S. at 521 (quoting *Matter of Laipenieks*, 18 I. & N. Dec. 433, 464 (1983)).

"harsh" in that context. 464 U.S. at 194. Continuous physical presence was found to preclude brief departures by permanent residents, who have a right to come and go freely from the United States. *Copeland Supra* In the case at bar, the Government argues here that it precludes brief travel abroad by U.S. citizens.

The Agency is adopting *Phinpathya*'s conclusion without regard to statutory context, purpose, and structure. *See Copeland*, 19 I&N Dec. at 789. Amici agree that the word "continuous" must be given effect; but that a period of presence can be terminated does not answer the question of what is required for that termination to occur. What makes a period continuous and what interrupts continuity necessarily depends on the context and circumstances. *Cf. United States v. Fullard-Leo*, 331 U.S. 256, 281 (1946) (considering continuity for purposes of adverse possession). *Phinpathya* did not hold otherwise, and did not purport to address this context. The agency is wrong when it maintains that context is irrelevant when interpreting a statute.[5]

The Court, of course, need not address this issue to rule for Mr. Morales-Santana. But insofar as the Government urges that the Second Circuit's rule would limit acquisition of citizenship due to the continuity requirement, its argument turns on a view of *Phinpathya* that cannot withstand scrutiny. To the extent that the Court reaches the issue, the Court

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[5] Indeed, if one were to ignore context, it would follow that courts would give effect to the Congressional choice to overturn *Phinpathya*, which indicates that when Congress uses the term "continuous physical presence," it does not mean for non-meaningful departures to interrupt that period.

should clarify that *Phinpathya* does not control in this context.

### B. Section 1409(c) Is Not Exclusive and Would Not Prejudice the Ability of a Mother to Convey Citizenship Under Other Citizenship Statutes.

The text of § 1409(c) does not provide an exclusive path to acquired citizenship. That is, § 1409(c) does not provide that a child of an unmarried citizen mother acquires citizenship at birth *only* under that section. Rather, a child may acquire citizenship at birth under § 1409(c) "notwithstanding" the provisions of § 1409(a). Nothing in the INA prevents children from acquiring citizenship under other provisions simply because § 1409(c) would grant at-birth citizenship if her mother met the criteria under that section.

The Government concedes that § 1409(c) is not exclusive; at a minimum, it admits that a U.S. citizen woman could convey citizenship under the general provisions of § 1401(a)(7) (requiring 10 years of physical presence); but the Government concedes the point only where a noncitizen father legitimated the child. Br. for Pet. 6 n.6.

Amici find this concession appropriate, but too grudging. Amici can locate no case suggesting that § 1409(a) limits acquisition of citizenship through an unwed mother. Rather, § 1409(a) "imposes a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother." *Nguyen v. INS*, 533 U.S. 53, 60 (2001). The idea that an unmarried citizen mother might be able to convey citizenship under § 1401 only if a noncitizen father

legitimated the child is a convoluted reading of the statute, and makes no sense.

Certainly, with regard to an unmarried U.S. Citizen father, § 1409(a) necessarily implies that the conditions of that subsection (requiring that paternity be established by legitimation) must be met in order for the child to acquire citizenship under the listed provisions of § 1401. But it would be illogical for § 1409(a) (governing legitimation by fathers) to limit a claim through a citizen mother. And § 1409(a) does not say otherwise. It provides that specified provisions of § 1401 "shall apply. . . if the paternity of such child is established," but it does not state that those provisions of § 1401 apply *only* where paternity is established. This silence certainly leaves room for a sensible interpretation of § 1409(a). *Cessante ratione legis, cessat ipsa lex.*

Moreover, even if the Government's impractical reading of § 1409(a) were plausible, it would almost certainly be unconstitutional. A reading that would exclude unmarried women from the scope of § 1409(a) and § 1401(a)(7), in those cases where § 1401(a)(7) is more advantageous than § 1409(c), would impermissibly discriminate against unmarried mothers on the basis of gender. *Cf. Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (subjecting gender distinctions to pass intermediate scrutiny).

Moreover, the Government appears to suggest that a mother in this unique posture—having physical presence of more than 10 years, but lacking continuous physical presence for 365 days—could convey citizenship to her child only if she married the child's noncitizen father. This interpretation would in effect "burden illegitimate children for the sake of punish-

ing" a mother for refusing to legitimate a child by marrying the father. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). It would also intrude into fundamental rights, i.e., "the freedom to marry or not marry," which "resides with the individual." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *cf. also Zablocki v. Redhail*, 434 U.S. 374, 378 (1978) (law represented "serious intrusion" into freedom to marry). But even if it implicated no fundamental rights or suspect categories, no rational basis could be assigned to a law that would allow citizenship to pass through an unmarried citizen woman only if she married.

Amici see no reason why the gender-based language of § 1409(a) could not itself be construed in a nondiscriminatory manner. The legitimation requirement turns on the laws of various states and countries. For instance, the Agency has found that Peruvian law treats a child as having been legitimated where proof of paternity or maternity was established in a competent proceeding. *Matter of Torres*, 22 I&N Dec. 28, 31, n.3 (BIA 1998). While § 1409(c) refers to the establishment of paternity, that is because maternity is often not subject to dispute. *Nguyen*, 533 U.S. at 62 (noting that maternity "is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth").[6]

The significance and intent of § 1409(a) is to impose some additional requirements on fathers, for reasons found sufficient in *Nguyen*. An unmarried mother is not prevented from conveying citizenship

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[6] That said, maternity determinations are not always clear. *See, e.g., In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59, 60 (Ind. Ct. App. 2010).

by those provisions, contrary to the Government's suggestions here. Nor would an unmarried father be so limited if the Court permitted the father to convey citizenship under § 1409(c) as well as § 1409(a).

It follows that an expanded application of § 1409(c) would not have the effect of preventing anyone from acquiring citizenship.

### C. To the extent that the lower court's remedy was at all unclear, the Court may adopt alternate language.

The Government argues that the lower court's remedy, which sought to conform the statutes to the constitution, is not narrowly tailored enough. Br. for Pet. 51. But rather than proposing modest alternate language which would implement the remedy without the purported negative side effects, the Government pivots from challenging the precise terms of the remedy to arguing for contracting citizenship or for construing the statute prospectively only. *Id.* at 51-54.

The lower court's remedy was not unclear. The conforming language would resolve the constitutional violation in simple, clear terms. Nor, as Amici explain above, would the remedy adopted below implicate the evils assigned it by the Government.

Even if the Government's points were well-taken, they would admit of simple resolution. The goal of the Second Circuit's language was to "replac[e] the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c)," *Morales-Santana v. Lynch*, 804 F.3d 520, 537 (2d Cir. 2015), as to unwed fathers. To the extent that the lower court's conforming language in

§ 1401(a)(7) could have any of the effects hypothesized by the Government, the simple solution would be to hold, without the need for any explicit conforming language, that the constitution requires § 1409(c) to apply to unwed fathers who satisfy the criteria of § 1409(a), as well as unwed mothers.

## III. At-Birth Citizenship Is Not Constrained by 8 U.S.C. § 1421.

The Government argues that even if the relevant statutes violate the constitution, the federal courts may afford no remedy. In support of this proposition, the Government cites a medley of inapposite language from cases involving naturalization or citizenship obtained after birth. Pet. Br. 50-51.

The Government also, in a footnote, cites 8 U.S.C. § 1421(d) as "reflect[ing] the courts' constrained authority" over citizenship matters. Pet. Br. 51 n.11. This footnote is neatly phrased so as to avoid making an actual argument, because the statute simply cannot support any such claim.

It is true that Congress has explicitly constrained authority to grant naturalization to that which is authorized by statute. But the statute also defines the term "naturalization" in terms which clearly exclude at-birth citizenship.

Under 8 U.S.C. § 1101(a)(23), naturalization "means the conferring of nationality of a state upon a person after birth, by any means whatsoever." This definition is crystal clear. It includes all forms of naturalization on application, as well as those automatic citizenship procedures which apply after birth. By the same token, the definition excludes the conferring of nationality at birth. The definition at § 1101(a)(23) governs how the term naturalization is

"used in this chapter." *Id.* § 1101(a). It follows that 8 U.S.C. § 1421(d) is inapplicable on its face to the question at hand.

The context and structure of § 1421, which governs naturalization authority, provide further support for this point. Section 1421 is exclusively concerned with the authority of courts over proceedings to seek naturalization upon application. Neither text nor context supports application of this provision to at-birth citizenship.

## IV. At-Birth Citizenship Statutes Protect Family Unity and Respect the Rights and Dignity of U.S. Citizens.

The Government focuses heavily on the role of at-birth citizenship statutes in avoiding statelessness, but it almost entirely overlooks the actual functioning of these statutes. As explained below, at-birth citizenship prevents harm by preserving family unity and respecting the rights and dignity of U.S. citizens.

Amici are only too familiar with the tragic separation of families in cases where at-birth citizenship is inapplicable. When this happens, any minor brush with the law can risk the child's legal status in the United States, and can trigger long periods of immigration detention. *See* 8 U.S.C. § 1226(c) (providing for mandatory detention in some cases). A recent Human Rights Watch report recounted the story of Arnold Aguayo, who was brought to the United States when he was one year old. HUMAN RIGHTS WATCH, A PRICE TOO HIGH: US FAMILIES TORN APART BY DEPORTATIONS FOR DRUG OFFENSES 2-3 (June 2015), https://www.hrw.org/sites/default/files/reports/us061

5_ForUpload_0.pdf. Mr. Aguayo's parents were citizens, but he never naturalized. In a period of drug dependency, he was convicted for minor drug possession offenses. *Id.* He was placed into removal proceedings; he was ultimately granted discretionary relief and allowed to remain in permanent residency status. In the meantime, he was detained. While he was detained, Mr. Aguayo's elderly father had two heart attacks. Mr. Aguayo requested a short leave from detention to say goodbye to his father; that request was denied. *Id.* at 2. On the day his father died, Mr. Aguayo was still in immigration custody.

Mr. Aguayo's story had a "happy" ending by immigration standards. Other U.S. citizen parents must witness their children being deported away from the only country they have ever known, to countries where they do not speak the language, into the face of danger. For instance, that same Human Rights Watch report describes the case of Raul Valdez, who was found ineligible for all relief due to a drug offense. He was deported away from his parents, siblings and children, though he had entered the U.S. at age 1. *Id.* at 30.

Under the current immigration regime, a removal order against Mr. Morales-Santana would be permanent. His conviction from 21 years ago renders him inadmissible as a moral turpitude offense, and he (as one admitted as a permanent resident) is barred from ever seeking a waiver of that ground. 8 U.S.C. § 1182(h)(2). If Mr. Morales-Santana is removed, he will never be able to return to live in this country, regardless of family ties, rehabilitation, or other discretionary factors. *Id.*; *see also* 8 U.S.C. § 1182(a)(9).

Respondent's father might not demonstrate ongoing harm from his son's removal, because he has already passed away. In a larger sense, though, the harm to Respondent's father was complete at Respondent's birth. Respondent, under the Government's approach, was always subject to the risk of losing his right to live in this country because his citizen parent was a man instead of a woman. The stake which U.S. citizen parents have in the question of their children's citizenship is both personal and familial. A parent is subject to direct, tangible harm not only from the loss of support from the child, the destruction of family unity, and the stress of worrying about a child living in a distant land, but from the risk all through that child's life that his ability to live in his father's country is conditioned on his continued good behavior.

## V. Other Automatic Citizenship Provisions, Enacted Simultaneously with § 1409(c), Are Further Evidence That the Statute Impermissibly Discriminates Against Unmarried Fathers.

The INA contains other provisions which grant automatic citizenship after a child's birth, provisions which are inapplicable to Respondent and are not directly relevant to this case. Those provisions provide further reason to believe that these statutes reflect assumptions and gender stereotypes which are impermissible in this context.

The Government accurately cites current 8 U.S.C. § 1431(a) (2015) as ameliorating some of the inequality of § 1409 for a hypothetical individual who is like Respondent except young enough to be covered by the 2001 statute. Under current § 1431(a), an individual like Respondent would become a citi-

zen after entering the United States as a permanent resident while a custodial parent is a U.S. citizen. The statute now applies regardless of when or how the parent became a citizen. 8 U.S.C. § 1431(a)(1).

The law applicable to Respondent differed in several respects. The prior statute only applied to parents who naturalized, not to citizen parents who were native-born. *See* 8 U.S.C. §§ 1431, 1432 (1952).

Under old § 1432, enacted together with § 1409(c), a child became a citizen if the child had permanent resident status and (a) both parents naturalized, 8 U.S.C. § 1432(a)(1) (1958); (b) a second parent naturalized when the first parent was already a citizen, 8 U.S.C. § 1431 (1952); or (c) the sole remaining parent naturalized when the other parent was deceased. 8 U.S.C. § 1432(a)(2) (1958). Most relevant here, § 1432 had a provision allowing a single parent to convey citizenship. That provision provided that citizenship was granted upon:

> The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation.

8 U.S.C. § 1432(a)(3) (1958). Litigants have argued that "legal separation" may be read to include two parents who have separate legal existences as unmarried people, but the Government has argued, and courts have unanimously agreed, that "legal separation" can occur only where the child's parents were legally married and subsequently divorced or separated. *See Wedderburn v. INS*, 215 F.3d 795, 799-800 (7th Cir. 2000).

Thus, § 1432 allowed citizenship to be conveyed through fathers only where they had been married at some point to the child's mother. An unmarried father could never convey citizenship under § 1432, with the sole exception of cases where the mother was deceased. Cf. 8 U.S.C. § 1432(a)(2) . An unmarried mother, by contrast, could convey citizenship so long as paternity had not been established by legitimation before the child obtained citizenship. 8 U.S.C. § 1432(a)(3) (1952).

In the § 1409 context, the Government argues that the gender discrimination serves important Governmental purposes. Those arguments fail in that context, but are also belied by § 1432(a), enacted simultaneously with § 1409. Both statutes preclude the unmarried father from conveying citizenship even where the father is granted legal custody of the child. The only fair explanation for § 1432, like § 1409, is that Congress was influenced by gender stereotypes and thought that unmarried fathers would not have as significant a role in the lives their children as an unmarried mother. No logical basis for the statutory distinction can be assigned without employing those gender stereotypes. Since those gender stereotypes are impermissible in this context, it follows that the statute is unconstitutional as written.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 15-1191

# In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

*v.*

LUIS RAMON MORALES-SANTANA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## BRIEF OF POPULATION AND FAMILY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

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[1] Counsel for each party has consented to the filing of this Brief, as indicated by letters filed with the Clerk of the Court. No counsel for a party authored any part of this brief in whole or part, and no person other than *Amici Curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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## SUMMARY OF ARGUMENT

Because women give birth, it can sometimes be difficult to see the sex stereotyping in laws that treat mothers differently from fathers, especially for matters such as the passage of citizenship from parent to child, as is at issue here. Compare Immigration and Nationality Act of 1952 § 309(a), 8 U.S.C. 1409(a), with *id.* § 309(c), 8 U.S.C. 1409(c).

Yet, as the population and social science data discussed *infra* show, nonmarital fathers are regularly in a parental role at the time of their child's birth and many, indeed most, formally acknowledge their paternity either at the hospital or in the birthing center just after the child is born. Many, too, are parenting their children without the involvement of a mother.

Viewed in light of this data, the challenged law's imposition of extra barriers on nonmarital fathers' passage of U.S. citizenship to their children—barriers that it does not place on nonmarital mothers—appears to reflect flawed gender stereotypes about the likely involvement of unwed fathers in their children's lives.

## ARGUMENT

When a child is born out of wedlock, that child may—and often does—have a father who is present and part of the child's life from the moment of birth. Yet the federal law at issue in this case requires that, to pass along U.S. citizenship, that father must have spent nine more years in the United States than the child's U.S. citizen mother, with five of those years after age 14. Immigration and Nationality Act of 1952 § 309(a), 8 U.S.C. 1409(a). By contrast, the U.S. citizen mother can pass along her citizenship to her child after having spent any one year of her life in the United States prior to the child's birth. *Id.* § 309(c), 8 U.S.C. 1409(c).

Perhaps it is difficult to see the impermissible gender stereotyping embedded in this sex-based rule because the father is not the person giving birth. The statute, however, contains no reference to either gestation or childbirth. Immigration and Nationality Act of 1952 § 309(c), 8 U.S.C. 1409(c).

Even further, the statute's explicit distinction between mothers and fathers directly contradicts the government's claim that the United States has an important gender-neutral interest in facilitating U.S. citizenship for a foreign-born child with only one legal parent at the time of birth and can impose a greater residency burden on the "second" legally-recognized parent. Cf. Pet. Br. 28 ("Although Section 1409(c) uses gendered terms by referring to 'the mother' of a child born out of wedlock, the differential treatment under that provision * * * turned on whether a foreign-born child had one legally recognized parent or two at the time of his birth.").

Indeed, the statute, as written, directly favors children born to two mothers and disfavors those born to parenting units that include a father (*e.g.*, a mother and father or two fathers). If the child has two legally-recognized parents, one a U.S. citizen and the other not, and both of those parents are mothers, the shorter time frame would apply because the statute does not distinguish between a child's birth mother and the child's other mother. See 8 U.S.C. 1409(c) ("Notwithstanding the provision of subsection (a) of this section, a person born * * * outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if *the mother had the nationality of the United States at the time of such person's birth*, and if the mother had previously been physically present in

the United States or one of its outlying possessions for a continuous period of one year.") (emphasis added).

By contrast, if a child has no mother, perhaps because she is unknown or died at childbirth or thereafter, the statute still imposes its extended-time requirement on the other parent—but only if that parent is a father. In this situation, the gender stereotyping underlying the government's stated rationale for treating mothers and fathers differently—that the United States can elevate the residency requirement for the "second parent," because that parent presents a "competing parental claim of a connection to a foreign country" (Pet. Br. 32)—is stark as well.

## POPULATION DATA AND SOCIAL SCIENTIFIC ANALYSIS DEMONSTRATE THAT NONMARITAL FATHERS ARE REGULARLY IN A PARENTAL ROLE AT THE TIME OF THEIR CHILD'S BIRTH

When sex-based differential treatment is said to turn on childbirth, it can be more difficult to see the gender stereotyping involved than in some other circumstances. Population data and related social scientific analysis, however, can help illuminate the stereotyping at work in the government's reliance on legal parentage at the moment of birth (rather than at the time of the child's citizenship application) to justify the statute's different treatment of mothers and fathers.

The remainder of this brief will turn to this data, which show that parentage from the time of birth regularly includes fathers as well as mothers and that to disadvantage U.S. citizen fathers because they are not married to the child's mother reflects, impermissibly, the gender stereotype that nonmarital fathers are unlikely to participate in their children's lives.

### A. Census And Other Population Data Confirm That Fathers Are Regularly Part Of The Household Of Children Born Outside Of Marriage

Although "out of wedlock" birth may be associated in the popular imagination with a mother raising her child alone, the reality is that "more than half of nonmarital births take place in a cohabiting household." Carl Haub, *Rising Trend of Births Outside Marriage*, Population Reference Bureau (Apr. 2013), http://www.prb.org/publications/articles/2013/nonmarital-births.aspx. According to the Centers for Disease Control and Prevention, "Nonmarital births are increasingly likely to occur within cohabiting unions—rising from 41% of recent births in 2002 to 58% in 2006-2010." Sally C. Curtin et al., *Recent Declines in Nonmarital Childbearing in the United States*, 162 NCHS Data Br. 4 (Aug. 2014), http://www.cdc.gov/nchs/data/databriefs/db162.pdf.

The nation's largest research initiative on births to unmarried parents in large cities across the country, known as the Fragile Families and Child Wellbeing Study, also confirmed the presence of fathers, as well as mothers, when children are born outside of marriage: "A large proportion of unmarried parents are in 'marriage-like' relationships at the time of their child's birth." Sara McLanahan et al., *Fragile Families and Child Wellbeing Study* 2 (RWJF Program Results Rep., Jan. 28, 2014), http://fragilefamilies.princeton.edu/sites/fragilefamilies/files/rwjf_program_results_report.pdf (discussing results from this longitudinal survey, which produced data generalizable to urban areas with more than 200,000 residents). "Half the studied couples were living together at the time of birth, and another 32 percent were romantically involved but living apart." *Ibid.* An additional study, based on the 1995 National Survey of Family Growth, likewise concluded that "[u]nmarried

mothers now tend to be older, to have other children, and to be living with a partner at the time of their child's birth." Kelly Musick, *Planned and Unplanned Childbearing Among Unmarried Women*, 64 J. Marriage & Fam. 915, 915 (2002) (citations omitted).

As scholars in this area have observed, "[w]hen cohabitation is ignored, two-parent families are classified erroneously as single-parent families." Larry L. Bumpass & R. Kelly Raley, *Redefining Single-Parent Families: Cohabitation and Changing Family Reality*, 32 Demography 97, 98 (1995). Professor Judith Seltzer has written similarly that "much of the recent rise in childbearing outside of marriage can be attributed to childbearing in cohabiting unions." Judith A. Seltzer, *Families Formed Outside of Marriage*, 62 J. Marriage & Fam. 1247, 1255 (2000).

Her observation that "[c]hildren in these unions start life in households with both of their biological parents instead of in a single-mother household," Seltzer, 62 J. Marriage & Fam. at 1255, helps to highlight the presence of sex discrimination in a law that imposes a significant burden on these children's fathers. As to the reason for this shift, she stated: "[c]hanges over historical time in how individuals understand and make choices about family relationships are rooted in long-term trends toward greater individual autonomy and the economic arrangements that facilitate individualism." *Id.* at 1258 (citation omitted).

Another set of scholars has similarly explained that although "[m]any people hear the words 'out of wedlock childbearing' or 'nonmarital childbearing' and imagine a single woman bearing and rearing a child by herself," the data suggest otherwise. Pamela J. Smock & Fiona Rose Greenland, *Diversity in Pathways to Parenthood:*

*Patterns, Implications, and Emerging Research Directions*, 72 J. Marriage & Fam. 576, 583 (2010). Writing in 2010, they observed that "[o]f all births, almost 20% are to unmarried couples who are living together, so-called cohabiting couples." *Ibid.* (citations omitted); see also Seltzer, 62 J. Marriage & Fam. at 1252 ("[w]omen are almost as likely to form nonmarital cohabiting unions as marry when they have a child.").

Indeed, unmarried cohabiting parents often have children intentionally, contradicting the related myth that out-of-wedlock births to cohabiting men and women couples are nearly all accidental. In the same 2006-2010 period studied by the Centers for Disease Control and Prevention, when close to 60% of all nonmarital births were to cohabiting parents, half of those pregnancies "were intended." Curtin et al., 162 NCHS Data Br. at 578 (stating that approximately 54% of cohabiting women "classify their pregnancies as planned") (citation omitted).

Research shows, too, "that several measures of father involvement were very similar among married and cohabiting fathers." Jo Jones & William D. Mosher, *Fathers' Involvement with Their Children: United States, 2006-2010*, 71 Nat'l Health Stat. Rep. 1 (Dec. 20, 2013), http://www.cdc.gov/nchs/data/nhsr/nhsr071.pdf.

In short, these data reveal the negative stereotyping of men within the assumption that unmarried fathers are either unaware of or have no meaningful relationship with their nonmarital children.

### B. A Majority Of Fathers Acknowledge Their Paternity Promptly After A Child Is Born And Many Maintain Involvement With Their Children, Whether Or Not They Are Romantically Involved With The Child's Mother

Another prevalent, gender-based assumption, also belied by extensive data, is that fathers are reluctant to acknowledge their children legally or be involved with their children in a parental role. To the contrary, data show that being male and unmarried does *not* mean that a person will avoid parenting responsibility. *Simply put, to assume that unmarried fathers, as a category of people, do not take responsibility for their children or exercise a parental role is to make an unreasonable, gender-based assumption.*

In fact, large numbers of fathers move quickly to acknowledge their parental role and responsibility. In 2014, for example, fathers voluntarily acknowledged paternity for more than two-thirds of the roughly 1,604,870 children born outside marriage. See Brady E. Hamilton et al., *Births: Final Data for 2014*, 64 Nat'l Vital Stat. Rep. 7 (2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf; Office of Child Support Enforcement, U.S. Dept. of Health and Human Servs., *FY 2014 Annual Report to Congress*, app. tbl. 2, at 251 (May 13, 2016), http://www.acf.hhs.gov/sites/default/files/programs/css/fy2014_part_10_appendix_tables_and_glossary.pdf.

Researchers with the Fragile Families study, discussed *supra*, also found that fathers most often sign Voluntary Acknowledgment of Paternity forms shortly after the child is born, often while still in the hospital. Ronald Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile*

*Families*, 67 J. Marriage & Fam. 611, 611, 615 (2005). Professor Mincy and his fellow researchers observed that "paternity establishment rates for nonmarital children born around the turn of the century are remarkably high-70%." *Id.* at 623. Of these acknowledgments, 81% occurred in the hospital or birthing center. *Id.* at 615; see also Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 Am. U. J. Gender Soc. Pol'y & L. 467, 476-477 (2012).

Research also shows that unmarried fathers who do not live with or have custody of their nonmarital children have, since the 1970s, been increasingly involved both personally and financially in their children's lives. Paul R. Amato et al., *Changes in Nonresident Father-Child Contact From 1976 to 2002*, 58 Fam. Rel. 41, 49 (2009). This rising level of contact with their children has continued even when fathers are no longer romantically involved with the mothers of their nonmarital children. *Ibid.*; see also Marcia Carlson, *Coparenting and Nonresident Fathers' Involvement with Young Children after a Nonmarital Birth*, 45 Demography 461, 472-473 (2008) (providing data on the number of nonresident fathers who maintain contact with their children at years 1, 3 and 5).

This desire of nonmarital fathers to maintain a relationship with their children is borne out as well by the Fragile Families study, which found that virtually all of the fathers interviewed reported that they wanted to be involved in raising their children in the coming years. Bendheim-Thoman Center for Research on Child Wellbeing, *Dispelling Myths about Unmarried Fathers*, Fragile Families Research Brief 1 (May 2000), http://fragilefamilies.princeton.edu/sites/fragilefamilies/files/researchbrief1.pdf. Two-thirds of the fathers in the study

had seen their children in the month before follow-up interviews conducted at the five-year mark. *Parents' Relationship Status Five Years After a Nonmarital Birth* at 2. Additional data from the National Center for Health Statistics show that approximately three out of four nonresident fathers are in contact with their children. Nat'l Responsible Fatherhood Clearinghouse, U.S. Dep't of Health & Human Servs., *Quick Statistics: Nonresident Fathers* 3 (2008), goo.gl/TDkvX4.

### C. Fathers Regularly Raise Children As Single Parents, And Gay Fathers Are Increasingly Raising Children On Their Own, Further Undermining The Justification For Treating U.S. Citizen Fathers Differently From Mothers

As of 2013, unmarried single fathers headed 8% of all American households in the United States and comprised nearly one-quarter of all single-parent households. Gretchen Livingston, Pew Research Center, *The Rise of Single Fathers* (July 2, 2013), http://www.pewsocialtrends.org/2013/07/02/the-rise-of-single-fathers (identifying single fathers as those not living with a spouse or partner).

Also in 2013, 648,000 custodial fathers were owed child support—over 11% of all custodial parents seeking support, reinforcing the substantial caregiving role that many unmarried fathers play in their children's lives. U.S. Census Bureau, U.S. Dep't of Commerce, *Custodial Mothers and Fathers and Their Child Support: 2013*, at 2 (2016), http://www.census.gov/people/childsupport/data/files/chldsu13.pdf. Research shows, as well, that custodial fathers were due $4.17 billion in child support in 2013 from their children's mothers. *Ibid.*

Further, according to recent census data, nearly 40,000 male couples are raising children together, and

two-thirds of those couples are married. U.S. Census Bureau, U.S. Dep't of Commerce, *American Community Survey Data on Same-Sex Couples* (2014), http://www.census.gov/hhes/samesex/files/ssex-tables-2014.xlsx (relevant survey data located at Tab 1 cells H8 and H37, and Tab 2 cells D8, D37, J8, and J37).

For these couples, the inequity and irrationality of the law's preferential treatment of mothers are even more obvious. Where there are two parents and both parents are male, the U.S. citizen parent will invariably be subjected to the more burdensome citizenship rule, solely because he is male and regardless of his role in his child's life.

### D. International Data Reinforce That Large Numbers Of Unmarried Fathers Function As Parents Alongside Their Children's Unmarried Mother

Many children born outside of the United States to unmarried parents are, like their U.S. counterparts, being parented by their fathers as well as by their mothers. A recent analysis of data from eight countries within the European Union by the Population Reference Bureau reported, for example, that "more than half of nonmarital births take place in a cohabiting household." Carl Haub, *Rising Trend of Births Outside Marriage*, Population Reference Bureau (Apr. 2013).

The Organisation for Economic Co-operation and Development (OECD), undertaking an even more global review, has found a steady significant increase in nonmarital births across the many countries that belong to OECD. OECD Family Database, *The Structure of Families: Share of Births Outside of Marriage* 2 (Feb. 4, 2016), http://www.oecd.org/els/family/SF_2_4_share_births_outside_marriage.pdf (citation omitted) (stating that

nearly one-quarter of children were born outside of marriage in 1995 across the 27 OECD countries and that by 2014, the percentage was above 40%). *Cf.* Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, Nat'l Ctr. for Health Stat. Data Br. 5 (May 2009) ("The upward trend in nonmarital childbearing seen in the United States is matched in most developed countries, with levels at least doubling or tripling and in some cases increasing many multiples between 1980 and the mid-2000s.").

In further analysis, the OECD also found that "in many countries the increase in the share of births outside of marriage is largely due to an increase in the number of couples cohabiting outside of a legally registered marriage." OECD Family Database, at 3. The report added: "This is particularly true in many of the Central and South American countries (*e.g.*, Chile, Mexico) where "free unions" (cohabiting, but not legally married) are increasingly common." *Ibid.*

In short, for children born abroad, a presumption that unmarried fathers are not present as parents, by virtue of their being fathers rather than mothers, is likewise neither reasonable nor accurate.

## CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court recognize the sex discrimination underlying the challenged law's extra burdens on nonmarital fathers and affirm the decision of the Second Circuit.

Respectfully submitted,

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IN THE
# Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
*Petitioner,*

v.

LUIS RAMON MORALES-SANTANA,
*Respondent.*

*On Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF *AMICI CURIAE* OF PROFESSORS OF HISTORY, POLITICAL SCIENCE, AND LAW IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are professors of history, political science, and law with particular expertise in the history of citizenship, gender, and family law. Amici have a professional interest in ensuring that the Court has adequate historical perspective on the law of citizenship and the extent to which it has been shaped by outdated gender-based stereotypes and norms.

## SUMMARY OF ARGUMENT

Sex-based laws premised on archaic presumptions about the proper roles of men and women run afoul of established constitutional principles, especially when they interfere with the parent-child relationship. Amici write to explain the history of the federal government's use of sex-based classifications in the regulation of citizenship. In its regulation of intergenerational and interspousal citizenship transmission, the federal government has perpetuated outdated gender-based norms concerning proper parental roles, even when those norms have been rejected in other legal and social contexts. In addition, the laws governing derivative citizenship have significantly encumbered the ability of American fathers to transmit citizenship to their foreign-born nonmarital children.

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1. All parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of amici's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

In its brief, the government contends that the purpose behind the explicitly sex-based citizenship statute at issue in this case is "gender neutral." The historical sources tell a very different story. As this Court has observed, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1977). The law governing derivative citizenship is part of that history.

Traditionally, the notion that the husband was the legal and political head of the marital family was one of the most powerful beliefs to shape the United States' regulation of derivative citizenship. The male-headship principle has informed every aspect of the derivative citizenship statute. For married citizen parents, well into the twentieth century the headship principle led to dramatic differences between the rights of citizen fathers and citizen mothers to transmit citizenship to their foreign-born children. Married citizen fathers could transmit citizenship to their foreign-born children starting in 1790; it was another 150 years before Congress recognized the right of married citizen mothers to do the same.

Outside of marriage, the reverse pattern prevailed. Social norms dictated that the mother bore responsibility for nonmarital children, while the father played little role in their care and upbringing. Based on these gender-based views about parental roles, the federal government substantially limited citizenship transmission between citizen fathers and their foreign-born nonmarital children in ways unrelated to the need to ascertain the existence of a biological or meaningful father-child relationship. At

the same time, the federal government readily recognized the citizenship claims of foreign-born nonmarital children of citizen mothers.

These gender-based patterns continue in the federal government's regulation of derivative citizenship today, separating fathers from their children in a manner that is contrary to this Court's equal protection jurisprudence.

## ARGUMENT

This Court has recognized time and again that laws that distinguish between men and women based on outdated understandings of their "talents, capacities, or preferences" are contrary to constitutional gender-equality principles. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero* 411 U.S. at 684 (1977); *Reed v. Reed*, 404 U.S. 71 (1971). One undeniable theme of these decisions is that such sex-based distinctions are suspect whenever they presume separate societal roles for the sexes, both vis-à-vis each other and vis-à-vis their children. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) (upholding a federal family leave law designed to redress the "pervasive sex-role stereotype that caring for family members is women's work"); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (recognizing that gender-based roles are no longer fundamental to marriage).

Another important theme in this Court's equal protection jurisprudence is that undue legal restrictions on the recognition of the father-child relationship outside marriage are constitutionally infirm and socially harmful, especially where those restrictions contribute to the stigma of "illegitimacy."

*See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing the interest of an unwed father "in the children he has sired and raised"); *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility.").

A reconstruction of the history of American citizenship law reveals that the sex-based parental presence requirements in the derivative citizenship statute that governs Respondent's citizenship contravene these well-established constitutional principles.

## I. FEDERAL CITIZENSHIP LAW HISTORICALLY PRIVILEGED THE RIGHTS OF MARRIED CITIZEN FATHERS AND SEVERELY LIMITED THE RIGHTS OF MARRIED CITIZEN MOTHERS.

### A. The Derivative Citizenship Laws Were Premised on the Belief That the Husband-Father Determined the Political and Cultural Character of His Wife and Children.

Historically, the husband's position as "head of the family" in domestic law gave him enormous power over both his wife and children.[2] In the early nineteenth century, the father had far greater legal rights with respect to the marital children than the mother. *See* Michael Grossberg, *Governing the*

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2. *See generally Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("[I]t became a maxim of *** [the common law] that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.").

*Hearth: Law and the Family in Nineteenth-Century America* 235, 242 (1985). He was considered the children's "legal guardian[]." *Id.* at 242. Moreover, the "headship" principle enhanced married men's cultural, political, and legal authority far beyond the household itself. Citizenship law was no exception. *See* Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830-1934*, 103 Am. Hist. Rev. 1440, 1452 (Dec. 1998); Virginia Sapiro, *Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States*, 13 Pol. & Soc'y 1, 11 (1984).

Operating under the presumption that the husband-father shaped the political and cultural character of his dependents, federal law privileged the father as the source of citizenship for foreign-born marital children from 1790, when the first citizenship statute was enacted, until 1934. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604, 604 [hereinafter "Act of 1855"]; Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155; Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 414, 415; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103-104. *See generally* Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* 33-38 (1998).

The male headship principle was so powerful that even ambiguous statutory language in the citizenship statutes of 1790, 1795, and 1802—which referred to the citizenship of children of "citizens"—was generally understood to require that the *father* was an American citizen. *See* 2 James Kent, *Commentaries on American Law* 53 (8th ed. 1854).

In 1855, Congress affirmed that interpretation, rewording the statute to clarify that only children

"whose *fathers* were or shall be at the time of their birth citizens of the United States, shall be deemed * * * citizens of the United States." Act of 1855, § 1 (emphasis added). In keeping with the established norm of male headship, Congress also declared that a non-citizen woman would become an American citizen simply by marrying an American man. *Id.* § 2. *See* Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 234-35 (1997).

In the late nineteenth and early twentieth centuries, the social and legal foundations of the male headship principle began to erode. State legislatures and courts gradually revised domestic laws giving husbands power over their wives' legal and economic personae.[3] By the late nineteenth century, judges and legislators began to abandon the common law principle that the husband-father was the "legal guardian" of his children, with parental rights superior to those of the married mother. *See* Grossberg, *supra*, at 253. Nevertheless, Congress continued to presume that the husband determined the political and cultural character of his dependents—both wife and children—and hence that their citizenship should conform to his.

For example, in 1922 Congress enacted the Cable Act which, among other things, limited an American man's absolute power to endow his foreign wife with citizenship simply by marrying her. Act of Sept. 22,

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3. *See* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073, 1083 (1994); T.A. Larson, *Woman Suffrage in Western America*, 38 Utah Hist. Q. 7, 19 (1970); *see also* U.S. Const. amend. XIX.

1922 (Cable Act), ch. 411, § 2, 42 Stat. 1021, 1022. But the Cable Act and other federal statutes continued to give preference to American men's foreign wives by expediting their naturalization process, *id.* §§ 2(a), (b), exempting them from race-based and national-origin immigration restrictions, and otherwise giving them preferential immigration status. Act of May 26, 1924, ch. 190, §§ 4(a), (d), 13(c), 43 Stat. 153, 155, 162. An American woman who married a foreign husband received no such preferential treatment. To the contrary, for many decades she was expatriated upon marriage to a foreigner and was denied the ability to transmit citizenship to her foreign-born children. *See infra* at 10-13; Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 84 (1998).

In short, well into the twentieth century, laws governing citizenship transmission reflected and perpetuated prevailing social and legal norms that secured men's place as head of the marital family.

### B. The Gender-Based Belief That the Wife Had No Independent Political Identity Shaped the Interpretation and Development of the Derivative Citizenship Statute.

The same norms that informed married fathers' power to transmit citizenship to their non-citizen wives and foreign-born children conversely led to substantial limitations on the citizenship rights of married American women. Under the doctrine of coverture, married women had no independent civil or legal identity—they were "dead" in the eyes of the law. *See* Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-*

*Century New York* 50-55 (1982). A wife's legal and political identity was "merged" into that of her husband. That principle was pervasive, shaping the political and legal rights of married women, including their rights as mothers. Although strong social and cultural norms made mothers the primary caregivers of children, for most of the nineteenth century the wife-mothers' parental rights remained secondary to those of the husband-father. *See* Grossberg, *supra*, at 235-36.

Even as these powerful norms were successfully challenged in other areas of law in the late nineteenth and early twentieth centuries, *see supra* n.3, they continued to inform Congress's regulation of married women's citizenship rights with respect to both their own citizenship and that of their foreign-born children. Three examples are especially revealing.

*First*, the principle of coverture was integrated into citizenship law through the expatriation of American women who married foreign men. This had not been the common law practice. *See Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830) (Story, J.); Bredbenner, *supra*, at 59. Nevertheless, in the late nineteenth century, some courts began expatriating American women who married non-citizens. *See, e.g., Pequignot v. City of Detroit*, 16 F. 211, 216 (C.C.E.D. Mich. 1883).

Consistent with its tendency to enhance the sex-discriminatory function of citizenship law, Congress codified the *Pequignot* holding in the Expatriation Act of 1907, which provided that "any American woman who marries a foreigner shall take the nationality of her husband." Act of Mar. 2, 1907

(Expatriation Act), ch. 2534, § 3, 34 Stat. 1228, 1228. Affirming the constitutionality of that Act eight years later, this Court observed that "[t]he identity of husband and wife is an ancient principle of our jurisprudence [which] * * * worked in many instances for her protection" and "give[s] dominance to the husband." *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915).

After the ratification of the Nineteenth Amendment in 1920, women's opposition to the Expatriation Act gained force. *See* Bredbenner, *supra*, at 81; Cott, 103 Am. Hist. Rev. at 1464; Sapiro, 13 Pol. & Soc'y at 13. Over fierce resistance by legislators and advocates who insisted that the principle of coverture should continue to dictate married women's citizenship status, in 1922 Congress ended the automatic expatriation of some, but not all, American women who married non-citizens. Cable Act, ch. 411, § 3, 42 Stat. at 1022. Most notably, under the Cable Act, the American woman whose foreign husband was racially ineligible to naturalize—at the time, individuals of Asian descent—continued to be stripped of her citizenship. *Id.* §§ 3, 5, 42 Stat. at 1022; 6 Fed. Stat. Ann. § 2169 (1918); *see also* Kerber, *supra*, at 42-43; Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641, 662, 694 n.335 (2005). No such racist penalty burdened an American man who did the same.

*Second*, even after the enactment of the Cable Act, married American women were still unable to transmit citizenship to their foreign-born children. *See* Bredbenner, *supra*, at 84; Kristin A. Collins,

*Illegitimate Borders*: Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2156-57 (2014). By the late nineteenth century, American women had gained far greater legal rights as parents within marriage. *See* Grossberg, *supra*, at 281-82. Nevertheless, the federal government resisted recognizing the married mother's right to transmit citizenship due to the persistent belief that the husband determined his children's political and cultural character.

This belief was apparent in debates over bills proposed in the 1930s that would have recognized married American mothers' foreign-born children as American citizens. As an Assistant Secretary of State explained in a letter submitted to Congress in 1933, "when a woman having American nationality marries a man having the nationality of a foreign country, and establishes her home with him in his country, the national character of that country is likely to be stamped upon the children," making the children "alien in character." Letter from Assistant Sec'y of State Wilbur J. Carr to Samuel Dickstein, Chairman of the House Comm. on Immigration and Naturalization (Feb. 10, 1933), *reprinted in Relating to the Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings on H.R. 3673 and H.R. 77 Before the H. Comm. on Immigration and Naturalization*, 73d Cong. 9 (1st Sess. 1933).

According to many officials, this concern was especially acute where the American mother had married a non-citizen who was racially excludable

under the naturalization laws. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876; 6 Fed. Stat. Ann. § 2169 (1918). In 1931, Congress had repealed the race-based exception in the Cable Act, so that a woman who married a husband "ineligible to citizenship" would no longer be expatriated. Act of Mar. 3, 1931, ch. 442, § 4(a), 46 Stat. 1511, 1511-12. However, there was great resistance to recognizing the children born to such marriages as American citizens. Not only might such a child be especially "alien" in his or her "character," but recognition of married American mothers' right to transmit citizenship to their foreign-born children would create a new path for entry into the United States for children who were otherwise racially excludable. *See* Collins, 123 Yale L.J. at 2191-95. As one representative explained in 1933, by allowing married women to transmit citizenship to their foreign-born children, "we are increasing the probability of bringing in more of the Chinese and Japanese, and 'what have you,' from these nations over there." Hearings on H.R. 3673, at 73d Cong. at 37 (statement of Representative Charles Kramer). Resistance to recognizing the right of married American mothers to secure citizenship for their foreign-born children was thus particularly intense because of concern that other priorities in American nationality law would be compromised.

*Third*, it was not until 1934 that Congress finally recognized the right of married American mothers to transmit citizenship to their foreign-born children. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797. But, even then, beliefs about married women's lack

of authority within marriage continued to shape the derivative citizenship law in significant ways.

The introduction of a child residence requirement is a revealing example. When, after almost 150 years, married women finally secured the right to transmit citizenship to their foreign-born children in 1934, Congress included a provision requiring the foreign-born child of an American parent and a non-citizen parent to reside in the United States for five years prior to turning 18. *Id.* § 1, 48 Stat. at 797. Although facially non-discriminatory, that requirement was animated by the persistent belief that the husband-father controlled the political character of the children. A 1938 letter to Congress from the Secretary of State, the Secretary of Labor, and the Attorney General explained that the five-year child-residence requirement was included in the 1934 Act because "Congress apparently took into consideration the fact that persons born in foreign countries whose *fathers* were nationals of those countries would be likely to have stronger ties with the foreign country than with the United States." House Comm. on Immigration & Naturalization, 76th Cong., Rep. Proposing a Revision and Codification of the Nationality Laws of the United States, Part One: Proposed Code with Explanatory Comments VI (1st Sess. 1939) [hereinafter "Proposed Code"] (Letter from Sec. of State Cordell Hull, Att'y Gen. Homer Cummings, and Sec. of Labor Frances Perkins to President Franklin D. Roosevelt (June 1, 1938)).

The same belief informed the derivative citizenship provision in the Nationality Act of 1940. That Act was drafted not by Congress, but by an

interdepartmental committee appointed by President Franklin Roosevelt in 1933, charged with revising the laws pertaining to citizenship, immigration, and naturalization. Exec. Order No. 6115, Revision and Codification of the Nationality Laws of the United States (Apr. 25, 1933). That committee, drawn from high-level administrators in the Departments of Labor, State, and Justice, proposed a five-year, age-calibrated child U.S. residence requirement that applied if the child was born to a mixed-nationality married couple. Proposed Code at 13-14; *see also* Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1137, 1139. However, as explained by the Secretary of State, the Secretary of Labor, and the Attorney General, the committee also was concerned that "these residence requirements will impose great hardship in some cases" where the "head of the family" worked abroad for the American government or an American enterprise of some sort. They therefore proposed a special statutory *exception* to the child residence requirement when the citizen parent was the "head of the family"—a legal term of art that, in this period, referred to the husband-father.[4] Proposed Code at VI.

The resulting statutory exception to the child residence requirement, while facially gender-neutral, relieved the children of many citizen *fathers* from that onerous requirement, while severely diminishing the likelihood that the children of citizen *mothers* would benefit from it. The exception was

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4. *See, e.g.*, *Cyclopedic Law Dictionary* 522 (3d ed. 1940) (defining "head of a family" in terms of the relationship between "father and child" or "husband and wife").

triggered only when the citizen parent "*at the time of the child's birth* [was] residing abroad *solely or principally in the employment* of the Government of the United States or a bona fide American * * * organization * * * for which *he* receives a substantial compensation." Nationality Act of 1940, § 201(g), 54 Stat. at 1139 (emphasis added). In the 1940s, married women with children were seldom engaged in such employment, especially not "at the time of [her] child's birth," and hence the exception was of virtually no use to citizen mothers.[5]

In the very design of the derivative citizenship statute, as it applied to mixed-nationality married couples, one can see the imprint of the male headship principle and the corresponding belief that the wife and children derived their political and cultural character from the husband-father Although married American mothers had acquired far greater legal parental rights in domestic law by 1940, the Nationality Act of 1940 did not treat them as equal citizens—or equal parents—for purposes of parent-child citizenship transmission.

Moreover, beliefs concerning the husband-father's disproportionate influence on his children's national character continued to inform the interpretation of the derivative citizenship statute even after the

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5. Women seeking employment abroad as Foreign Service officers faced pervasive sex discrimination. *See* Homer L. Calkin, *Women in American Foreign Affairs* 102-03, 110 (Aug. 1977). Moreover, in the mid-twentieth century, working women were regularly lawfully dismissed during pregnancy, and few had access to maternity leave or job security following the birth of a child. *See* Alice Kessler-Harris, *In Pursuit of Equity: Women, Men and the Quest for Economic Citizenship in 20th-Century America* 210-11 (2001).

Immigration and Nationality Act of 1952 (the 1952 Act) secured greater formal equality for married citizen mothers. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163. In *Rogers v. Bellei*, decided in 1971, this Court discussed the concern that children who grow up in a mixed-nationality family will develop "divided" loyalties. The Court observed that such a concern was especially valid "when it is the father who is the child's alien parent and the father chooses to have his family reside in the country of his own nationality." 401 U.S. 815, 832 (1971).

In sum, the historical sources show that beliefs regarding men's and women's respective roles as parents—especially the father's role as "head of the family"—shaped the development and interpretation of the derivative citizenship law as it applied to the marital family well into the late twentieth century. Those beliefs continued to inform citizenship law even after their influence had significantly diminished in other domains of law, including the law of parent and child. The constitutional infirmity of these laws today is clear to modern jurists. Reflecting on these and similar sex-based immigration statutes in *Kerry v. Din*, Justice Antonin Scalia observed that "[m]odern equal-protection doctrine casts substantial doubt on the permissibility of such asymmetric treatment of women citizens" and that "modern moral judgment rejects the premises of such a legal order." 135 S. Ct. 2128, 2136 (2015).

## II. GENDER-BASED BELIEFS ANIMATED—AND CONTINUE TO ANIMATE—THE DISPARATE RIGHTS OF CITIZEN FATHERS AND MOTHERS OF CHILDREN BORN OUTSIDE MARRIAGE.

Outside the bonds of marriage, a mirror-opposite pattern of sex-based regulation of derivative citizenship prevailed. Starting in the early twentieth century, federal officials readily recognized the citizenship claims of the foreign-born children of unmarried citizen mothers. By contrast, the transmission of citizenship between citizen fathers and their foreign-born nonmarital children was severely restricted. This system, which remains in place today, has constrained the ability of individual mothers and fathers to parent their children free of sex-based regulations that presume that they will perform particular gender-specific roles. As significant, it has created legally insurmountable hurdles to the recognition of the father-child relationship and, in the process, has divided fathers from their children. In so doing, it has perpetuated the ignominy and disadvantages of "illegitimacy" by extending that status to the child's citizenship. In these ways, the gender-asymmetrical derivative citizenship laws contravene this Court's well-established equal protection jurisprudence. *See Hibbs*, 538 U.S. at 736 ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men."); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 171 (1972) (worker's compensation provision that barred collection by illegitimate children is

unconstitutional where father is unable to legally acknowledge his child).

### A. The Sex-Based Requirements in the Derivative Citizenship Statute Are Premised on and Perpetuate the Gender Stereotype That the Mother Is the "Natural" Caregiver of the Nonmarital Child.

Premised on the view that mothers are responsible for the care of nonmarital children, the federal government has been far more solicitous of the citizenship claims of foreign-born nonmarital children of citizen mothers than it has been of claims of foreign-born nonmarital children of citizen fathers. This practice reflected an important development in the law governing the relationship of the mother and her nonmarital child. While long considered "the son of nobody" under the common law, the nonmarital child was customarily in the care of the mother. 1 William Blackstone, *Commentaries* *458-59. Gradually, the mother-child relationship was given legal recognition by American jurists and legislators, reflecting the customary understanding that the mother was the child's "natural" caregiver. Grossberg, *supra* at 207-09.

Based on that understanding, as well as powerful maternalist norms that shaped American law in the early twentieth century, federal officials of that era recognized the citizenship claims of foreign-born nonmarital children of citizen mothers even before Congress addressed the subject in legislation. *See, e.g.*, Proposed Code at 18 (noting that "[t]he Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the

nationality of the mother * * *."); *see also* Collins, 123 Yale L.J. 2200-01.

In the 1920s, this special recognition of the foreign-born nonmarital children of American mothers was memorialized in a cross-border agreement between the Department of Labor's Bureau of Immigration and Canadian immigration officials. In this agreement, officials of both countries agreed to recognize the foreign-born nonmarital child as a citizen of the mother's country. *See id.* at 2201-03. The Department of State followed the same practice. Proposed Code at 18.

In numerous memoranda and letters explaining the cross-border agreement, federal officials opined that nonmarital children were in need of special recognition under the derivative citizenship statute, which at the time provided for citizenship transmission only through the married father. *See* Collins, 123 Yale L.J. at 2203. Because mothers were the presumed caregivers of nonmarital children, that patrilineal rule would leave the child divided by citizenship law from his or her caregiver. "[T]he only purpose [for the rule] is to provide against separation of mothers and children," explained the Commissioner General of the Bureau of Immigration in 1929. Letter from Harry E. Hull, Comm'r Gen., U.S. Bureau of Immigr., to T.M. Ross, Acting U.S. Comm'r of Immigr., Montreal, Can. (Nov. 8, 1929)[6]; *see also* Collins, 123 Yale L.J. at 2202-03 (describing similar memoranda).

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6. Archival sources cited herein are located in the National Archives and Records Administration in Washington, D.C. Amici will provide copies to the Court upon request.

In the late 1930s, as the interdepartmental committee revised the entire corpus of American nationality law, *see supra* at 13, it included a provision that would codify the administrative practice of recognizing the foreign-born nonmarital children of American mothers as American citizens. Cabinet-level officials endorsed this provision. For example, in 1939, when the issue came to the attention of Secretary of Labor Frances Perkins, she opined that "steps should be taken to avoid subjecting these unfortunate individuals to unnecessary hardships." Letter from Frances Perkins, Sec'y of Labor, to Cordell Hull, Sec'y of State 3 (Mar. 15, 1939). Attorney General Frank Murphy concurred, noting that "exclusion of [such] children is not only harsh, but largely impracticable." Letter from Frank Murphy, Att'y Gen., to Cordell Hull, Sec'y of State 2 (May 10, 1939).

When Congress enacted the Nationality Act of 1940, it adopted the language in the committee's Proposed Code concerning the citizenship status of foreign-born children of American mothers. Section 205 of the Act provided that if the "mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions," the child "shall be held to have acquired at birth her nationality status." Nationality Act of 1940, § 205, 54 Stat. at 1139-40; *see also* Proposed Code at 18. Thus, citizenship transmission between the citizen mother and her nonmarital child was limited only by a *de minimis* parental residence requirement—a situation that continued under the 1952 Act (the

version of the statute at issue in this case)[7] and every revision of the derivative citizenship statute since then. Immigration and Nationality Act of 1952, § 309, 66 Stat. at 238-39; Act of Nov. 14, 1986, Pub. L. No. 99-653, 100 Stat. 3655.[8]

In short, the historical sources make clear that the federal government's ready recognition of citizen mothers as the source of citizenship for foreign-born nonmarital children was largely driven by concern that the citizenship of the nonmarital child should align with that of his or her caregiver, and that the "natural" caregiver was the mother. In so doing, it has reinforced fixed notions concerning the roles and abilities of men and women as parents, thus running afoul of this Court's well-established equal protection jurisprudence. *See, e.g., Califano v. Westcott*, 443 U.S. 76, 89 (1979) (internal quotations omitted) (presumption that "the father has the primary responsibility to provide a home" while "the mother is the center of home and family life" is not a valid basis for legislation).

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7. Sections 301 and 309 of the 1952 Act were codified in the 1958 edition of the United States Code. See Pet. Br. at 3 n.1.

8. In 1952, Congress deleted a primary limitation on mother-child citizenship transmission outside marriage—that the child would take the citizenship of his or her American mother only "in the absence of * * * legitimation" by the father. Nationality Act of 1940, § 205, 54 Stat. at 1140; Immigration and Nationality Act of 1952, § 309(c), 66 Stat. at 238-39. Congress also lengthened the parental presence requirement applicable to citizen mothers of foreign-born nonmarital children to one year. *Id.* § 309(c), 66 Stat. at 238-39.

### B. The Sex-Based Requirements in the Derivative Citizenship Statute Place Undue Burdens on the Father-Child Relationship and Reinforce Gender-Based Parental Roles.

Premised on the outdated view that unwed fathers have attenuated relationships with their nonmarital children, American citizenship law has consistently burdened father-child citizenship transmission outside marriage. In this regard, the derivative citizenship statutes have not only reinforced gender-based understandings of parental roles and responsibilities, they have also thwarted—and continue to thwart—the development of father-child relationships outside marriage in contravention of this Court's equal protection jurisprudence. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (invalidating a state adoption law that discriminated against unwed fathers, thus classifying them "as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children").

#### 1. Historically, the Derivative Citizenship Statute Has Been Narrowly Interpreted to Restrict Citizenship Transmission Between Citizen Fathers and Their Foreign-Born Nonmarital Children.

The 1952 Act's ten-year parental presence requirement—which applies to American fathers of nonmarital children, but not to American mothers of nonmarital children—is just one of many legal barriers that restrict citizenship transmission between American fathers and their foreign-born nonmarital children. In the present case, the government urges that this ten-year presence

requirement is "gender neutral" in its purpose and function in that it simply incorporated the legal "reality" of the father-child relationship at the time. Pet. Br. at 5, 9, 11, 40. The historical evidence shows instead that it is one of several statutory provisions that reflected and reinforced federal administrators' and legislators' inability to conceive of fathers as caregivers responsible for the well-being of their nonmarital children.

Such gender-based biases concerning parental roles outside marriage were pervasive in the nineteenth century and resulted in the restriction of father-child citizenship transmission outside marriage, even before Congress explicitly addressed the citizenship status of foreign-born nonmarital children in 1940. From 1790 to 1940, the derivative citizenship statutes were silent as to the marital status of the citizen parent. Act 1855, § 1; Act of Apr. 14, 1802, § 4, 2 Stat. at 155; Act of Jan. 29, 1795, § 3, 1 Stat. at 415; Act of Mar. 26, 1790, 1 Stat. at 103-104. Nevertheless, these statutes were interpreted to allow transmission of citizenship to the *marital* children of citizen fathers, but not to their *nonmarital* children.

The lead nineteenth-century case on this subject, *Guyer v. Smith*, 22 Md. 239 (1864), was routinely cited as the authoritative interpretation of the pre-1940 derivative citizenship statute by jurists, administrators, and commentators through the 1930s. *See* Collins, 123 Yale L.J. at 2153-54 nn. 67-68. In *Guyer*, the father had recognized his two sons by giving them his name and naming them in his will. *See Guyer*, 22 Md. at 246. Yet the *Guyer* court refused to recognize the sons as citizens under

the governing citizenship statute, which provided that "the children of persons who now are or have been citizens of the United States" born in another country, "shall * * * be considered as citizens of the United States," *id.* at 244 (internal quotation marks omitted). The court concluded that the sons were "illegitimate" and thus not contemplated by the statute. *Id.* at 249.

By 1920, judges and administrators gradually recognized the citizenship claims of at least some foreign-born nonmarital children who had been "legitimated" by the citizen father. *See* 32 Op. Att'y Gen. 162, 164-65 (1920). But this administrative legitimation exception was narrow and uncertain. *See, e.g., Mason ex rel Chen Suey v. Tillinghast*, 26 F.2d 588, 589 (1st Cir. 1928) (affirming rejection of evidence of legitimation for purposes of determining citizenship of foreign-born nonmarital child of American father of Chinese descent); *see also* Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 612-13 (1915) (questioning the propriety of legitimation as a basis for father-child citizenship transmission and observing that "illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens"); Collins, 123 Yale L.J. at 2174-80.

The federal government's resistance to recognizing the foreign-born nonmarital children of American fathers as citizens continued into the early 1930s. Legislators considered bills that would have secured parental gender equality with respect to the transmission of citizenship from citizen parents to their foreign-born children, regardless of the parents' sex or marital status.

> Any child, *whether legitimate or illegitimate*, born out of the limits and jurisdiction of the United States, whose father or mother may be at the time of the birth of such child a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any child whose father or mother had never resided in the United States previous to the birth of such child.

H.R. 14,684, 71st Cong. § 3 (3d Sess.1930) (emphasis added); *see also* H.R. 5489, 72d Cong. (1st Sess.1931).

Supporters of such bills urged that equal treatment of the citizen mothers and fathers of foreign-born nonmarital children was warranted pursuant to the gender-equality principles that informed the 1922 Cable Act. *See supra* at 9; Hearings on H.R. 5489, 72d Cong. 3-5 (statement of Burnita Shelton Matthews); *id.* at 17-19 (statement of Laura M. Berrien). Nevertheless, resistance to full gender equality in matters relating to derivative citizenship was fatal to the inclusion of "illegitimate" in the bill. *See* Bredbenner, *supra*, at 230-31. And in 1934, when Congress passed a statute enabling married citizen mothers to transmit citizenship to their foreign-born children, the final version of the bill said nothing about parental marital status, but was understood to apply to the foreign-born children of married citizen parents only. 78 Cong. Rec. 7357 (Apr. 25, 1934) (statement of Rep. Jenkins) ("[This bill] applies to the children of wives and the children of husbands."); 39 Op. Att'y Gen. 290, 291 (1939)

(recognizing "that the applicable statutory provisions apply only to legitimate children").

Six years later, Congress finally addressed the citizenship status of foreign-born nonmarital children of American citizens, making explicit in law what had been understood for many decades: American citizenship law would distance fathers from their nonmarital children. Nationality Act of 1940, §§ 201(g), 205, 54 Stat. at 1139-40.

Written by the administrators appointed by President Roosevelt to the interdepartmental committee, *supra* at 13, the Nationality Act of 1940 required that the father prove paternity by "legitimation" or by "adjudication by a competent court," *id.* § 205, and contained a five-year, age-calibrated U.S. residence requirement for the child, as had the 1934 Act, *id.* § 201(g). In addition, the 1940 Act extended the law's sex-based differential treatment of citizen parents of nonmarital children by imposing new limitations on the transmission of citizenship from citizen fathers to foreign-born nonmarital children, including: (1) a ten-year, age-calibrated U.S. presence requirement for the father, *id.* § 201(g), and (2) a requirement that the child must be in the father's custody at the time of legitimation, *id.* § 102(h). None of these requirements applied to unmarried American mothers or their foreign-born children. *Id.* § 205.

In 1952, Congress essentially recodified these provisions, making one significant change with respect to fathers of nonmarital children: it eliminated the possibility that paternity could be established by a "competent court." Immigration and Nationality Act of 1952, § 309, 66 Stat. at 238.

### 2. The 1952 Act Places Undue Burdens on the Father-Child Relationship and Is Premised on Outdated Gender-Based Beliefs About Parental Roles.

Careful examination of the text and implementation of the 1952 Act demonstrates that the gender-asymmetrical requirements in the derivative citizenship provision both: (1) place substantial burdens on the American father's ability to establish a relationship—legal and social—with his nonmarital child, and (2) reinforce the gender-based stereotype that fathers are not proper or adequate caregivers, especially without a wife-mother's presence. In both respects, these provisions run afoul of well-established equal protection principles.

*First*, the "legitimation" requirement in the 1952 Act has left many fathers divided by citizenship from children with whom they had a legally recognized relationship under the domestic law of the relevant jurisdiction,[9] and for whom the fathers were willing and able to provide care.

This is because both today and in the past, federal officials interpreting the term "legitimation" in the 1952 Act have refused to recognize children as citizens unless the process of paternal legitimation used by the American father gave the child *exactly* the same rights and entitlements as a marital child.

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9. Section 101(c) of the 1952 Act specifies that the child has to have been "legitimated" under "the law of the child's residence or domicile, or * * * the law of the father's residence or domicile," whether U.S. or foreign. Immigration and Nationality Act of 1952, § 101(c), 66 Stat. at 171.

*See In re Reyes*, 17 I&N Dec. 512, 514-15 (BIA 1980) (noting that the BIA has long interpreted "legitimation" to require that the nonmarital child had "attained the full legal status of legitimate children"). In the mid-twentieth century, as today, in many jurisdictions the nonmarital child could achieve full equality with the marital child only if the father married the mother. *See id.* at 514 ("legitimation laws have commonly required the subsequent marriage of a child's natural parents"); *see also Retuya v. Mueller*, 412 F. App'x 185, 188-189 (11th Cir. 2010) (holding that paternity established by formal acknowledgment allowed under Florida law did not satisfy the 1952 Act's "legitimation" requirement)[10]; Collins, 123 Yale L.J. at 2198 n.256 (providing examples of federal officials' refusal to recognize paternal acknowledgment as "legitimation" absent marriage of the parents). Thus, the 1952 Act required fathers to do far more than prove paternity and recognize the child in writing during the child's minority, as is permitted under the 1986 version of the derivative citizenship statute that this Court described as imposing only "minimal" requirements on the father in *Nguyen v. INS*, 533 U.S. 53, 70 (2001).

Moreover, because the legitimation requirement has been held to require much more than formal paternal acknowledgment, it is often impossible—legally or otherwise—for a father to secure

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10. For additional examples of Board of Immigration Appeals opinions rejecting various acts of paternal acknowledgment recognized under the laws of the relevant jurisdictions as insufficient to qualify as "legitimation," *see Matter of D—*, 7 I&N Dec. 438 (BIA 1957) (collecting cases).

citizenship for his foreign-born nonmarital child. For example, if full "legitimation" under the relevant jurisdiction's domestic laws requires marriage of the parents—as was, and still often is, the case—then the American father may be completely precluded from satisfying the derivative citizenship statute's legitimation requirement. Marriage to a child's mother may be legally or physically impossible, either because the child's mother refuses, is married to another, or has died, or because the marriage was prohibited, as was the case of many interracial marriages prior to this Court's opinion in *Loving v. Virginia*, 388 U.S. 1 (1967). *See* Collins, 123 Yale L.J. at 2209-11; *see also* Rose Cuison Villazor, *The Other* Loving: *Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. Rev. 1361, 1429, 1434 n.451 (2011). Indeed, in the past, when a father could not marry his foreign-born child's mother because a state ban on interracial marriage made it impossible for him to fully legitimate his child, the legitimation requirement in the derivative citizenship statute operated as a sex- *and* race-based barrier to the transmission of American citizenship.

The government contends that the derivative citizenship statute's gender-differentiated treatment of mothers and fathers outside marriage reflected the legal "reality" that domestic family law did not recognize the unwed father as a legal parent at birth. Pet. Br. at 5, 10, 11, 40. Thus, the government reasons, the derivative citizenship statute distinguished between two "gender-neutral" categories of parents: those who were "legally recognized" under the domestic law of the relevant

jurisdiction and those who were not. Pet. Br. at 9, 11, 28, 40.

The historical sources show, however, that the laws governing the parent-child relationship outside marriage in the 1940s and 1950s were not "gender neutral." Indeed, in the 1970s and 1980s, this Court found that many of those laws were informed by impermissible gender-based beliefs about men as fathers, thus violating the equal protection and due process rights of unmarried fathers and their children. *See, e.g.*, *Trimble* 430 U.S. at 769; *Stanley*, 405 U.S. at 651; *Weber*, 406 U.S. 171; *Caban*, 441 U.S. at 389.

Moreover, even though the laws in the early twentieth century limited recognition of the father's relationship with his nonmarital child in ways that are no longer tolerated, the legal principles that governed that relationship were far more varied than the government now suggests. By 1952, many jurisdictions allowed fathers to establish paternity through formal or informal acknowledgment, which often conferred inheritance rights on the nonmarital child.[11] Significantly, some jurisdictions granted inheritance rights even absent voluntary legitimation or recognition by the father.[12] These inheritance laws augmented the ubiquitous and

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11. *E.g.*, Idaho Code Ann. § 14-104 (1932); Okla. Stat. Ann. § 1619 (Harlowe 1931); Wash. Rev. Code § 11.04.080 (1951); Iowa Code Ann. § 636.46 (1946); Kan. Stat. Ann. §§ 59-501, 506 (1949); Ala. Code tit. 27, § 11 (1940). *See also* 7 Am. Jur. Bastards §§ 54-55, 57, 59 (1937).

12. *E.g.*, Iowa Code Ann. § 636.46; Kan. Stat. Ann. §§ 59-501, 506. *See also* 7 Am. Jur., *supra*, n.11 § 53.

traditional paternity statutes that enabled the nonmarital child, or someone acting on his or her behalf, to sue the father for financial support.[13] Taken together, these statutes signaled important changes in the laws governing the father-child relationship as they substantially abandoned the common law principle that the nomarital child "was the son of nobody." 1 Blackstone, *Commentaries* *459. Despite significant changes in the laws governing the father-child relationship outside of marriage, however, federal officials enforcing the 1952 Act refused to recognize that relationship unless the father fully "legitimated" the child. *Cf.* Kerry Abrams & Kent Piacenti, *Immigration's Family Values*, 100 Va. L. Rev. 629, 698 (2014) ("The same person who might likely be declared a legal parent under state family law will often find himself to be a legal stranger to his child for citizenship law purposes.").

In short, Congress did not simply incorporate domestic laws governing what counted as a legal parent-child relationship when it drafted the 1952 Act's derivative citizenship provision. Rather, by requiring full "legitimation" by the citizen father of his nonmarital child, the Act, as interpreted by federal officials, imposed an often insurmountable, undeniably sex-discriminatory burden on the transmission of citizenship between fathers and their nonmarital children. In so doing, it has thwarted fathers' efforts to establish legal and social

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13. *See* Ernst Freund, *Illegitimacy Laws of the United States and Certain Foreign Countries* 27-30, U.S. Dep't of Labor, Child. Bureau (1919). *See also* 7 Am. Jur., *supra*, n.11 § 69.

relationships with their children. *See Trimble*, 430 U.S. at 769 (state probate law that barred "illegitimate" children from inheriting from their fathers and allowed "legitimation" only by subsequent marriage of the parents violates equal protection).

*Second*, taken together, the numerous statutory burdens placed on American fathers attempting to secure citizenship for their nonmarital children—burdens not placed on American mothers—reflect the gender-based belief that mothers are the natural caregivers for nonmarital children.

This point is amply demonstrated by the joint operation of the legitimation requirement and the ten-year parental presence requirement in the 1952 Act. Under the terms of that statute, once the father "legitimated" the child, which often required marriage to the mother, the statute required him to satisfy the ten-year presence requirement. Immigration and Nationality Act of 1952, § 309(b), 66 Stat. at 238. No statute or policy has ever required American mothers to marry the nonmarital child's foreign father or go through *any* legal procedure in order to transmit citizenship to that child. Indeed, if the mother *did* marry the child's non-citizen father, under the 1952 Act the mother was exempt from satisfying the significantly longer parental presence requirement that applied to fathers of nonmarital children.[14] Immigration and Nationality Act of 1952, § 309(c), 66 Stat. at 238-239.

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14. The government acknowledges this fact, Pet. Br. at 6, 39 n.8, but appears to assert a contrary position elsewhere its brief, *id.* at 10.

Operating together, the sex-based legitimation requirement and the sex-based ten-year presence requirement reveal the outdated presumption that courses through the 1952 Act: mothers invariably raise nonmarital children and fathers do not. Early- and mid-twentieth century legislators and administrators who crafted this derivative citizenship law felt an imperative to relax the generally-applicable requirements for citizenship transmission for the nonmarital children of American *mothers* out of concern that children would be separated from their caregivers. *See supra* at 18-19. Yet, they declined to give such consideration to the nonmarital children of American *fathers*.

This occurred not because Congress was beholden to a particular immutable, legal conception of the "legally recognized" father-child relationship outside of marriage. Indeed, as has been shown, federal officials charged with implementing the derivative citizenship law routinely used a far more restrictive understanding of the legal father-child relationship than was provided in the domestic laws of state and foreign jurisdictions. Rather, consistent with its long-standing practice, Congress codified and maintained anachronistic gender-based norms concerning the father-child relationship in the laws governing citizenship transmission to nonmarital foreign-born children.

It continues to do so today, despite developments in this Court's equal protection jurisprudence, which for several decades has recognized that "maternal and paternal roles are not invariably different in importance," *Caban*, 441 U.S. at 389, and that the belief that "caring for family members is women's

work" is no longer an acceptable legislative purpose, *Hibbs*, 538 U.S. at 731.

## III. HISTORICAL EVIDENCE DOES NOT SUPPORT THE CONTENTION THAT CONGRESS ENACTED THE GENDER ASYMMETRICAL CITIZENSHIP STATUTE IN AN EFFORT TO PROTECT CERTAIN CHILDREN AGAINST STATELESSNESS.

The government contends that Congress eased the conditions under which mothers transmit citizenship to their nonmarital foreign-born children—and, in particular, exemption from the ten-year parental presence requirement—out of concern for the risk of statelessness for these children. Pet. Br. at 33-39. This assertion ignores the best evidence of why the gender-asymmetrical presence requirement, which was so generous toward unmarried mothers and their foreign-born children, was first introduced into the derivative citizenship statute in 1940.

As already noted, the primary origin of the 1940 Act's recognition of foreign-born nonmarital children of American mothers as citizens was the policies of the Department of Labor and the Department of State, including a cross-border agreement with Canada in which officials of both countries agreed to recognize the foreign-born nonmarital child of an American or Canadian mother as a citizen of the mother's country. *See supra* at 18. In the memoranda and letters by administrators discussing and memorializing that agreement, there is virtually no mention of statelessness. *See* Collins, 123 Yale L.J. at 2204-05 n.283. Rather, the documents reflect early twentieth-century officials' understanding that

mothers are the presumed and natural caregivers of their nonmarital children, and their concern that the separation of mothers from their nonmarital children was both harsh and impractical. *Id.* at 2200-03. The same is true of memoranda and letters by cabinet-level officials and members of the interdepartmental committee concerning why special solicitude should be shown to foreign-born nonmarital children of American mothers: the need to keep the child with his or her "natural" caregiver. *See supra* at 18-19.

In addition, even assuming that early twentieth-century administrators and legislators were concerned that the foreign-born nonmarital children of American mothers were at risk of statelessness, any such concern appears to reflect the same gender bias that long structured intergenerational citizenship transmission in American law. In the 1930s, experts in citizenship law knew that the foreign-born nonmarital children of American mothers *and* fathers were at risk of statelessness. In the most important early twentieth-century American treatise on the subject, *Statelessness: With Special Reference to the United States* (1934), Professor Catharine Seckler-Hudson described the risk of statelessness facing all nonmarital children. *See id.* at 224-25. She was skeptical that, in 1934, the United States would recognize foreign-born nonmarital children of citizen fathers as American citizens, whether legitimated or not. *Id.* at 224, 220-221 (citing *Guyer*, 22 Md. 239). Accordingly, she observed that when these children were born in *jus sanguinis* countries in which they did not acquire nationality through the mother, they "had no effective citizenship." *Id.* at 221.

Also—and of particular significance here—Seckler-Hudson noted the risk of statelessness for nonmarital children born to American fathers who did not satisfy the parental presence requirement in the derivative citizenship statute, which in 1934 was *de minimis*. *Id.* at 220, 225.

Thus, the risk of statelessness for foreign-born nonmarital children of citizen fathers was well known when members of the interdepartmental committee and legislators were considering the question of how to regulate citizenship transmission to nonmarital foreign-born children in the 1930s. Indeed, Congress was presented with legislative proposals that would have helped remedy the various risks of statelessness confronting foreign-born children of American citizens, and would have done so in a gender-neutral manner, but chose not to enact them. These were bills introduced in the early 1930s that provided that "[a]ny child, legitimate or illegitimate" born abroad of a citizen mother or father was an American citizen, subject to a modest (and gender-neutral) parental presence requirement. *E.g.*, H.R. 14,684, 71st Cong. § 3 (3d Sess.1930); *supra* at 24. Congress rejected those bills, despite the fact that Seckler-Hudson endorsed this legislation in her book. Seckler-Hudson, *supra*, at 222. Instead, Congress enacted a statute that imposed a ten-year presence requirement on American fathers who "legitimated" their foreign-born children, thus exposing them to a substantial risk of statelessness if they did not acquire the citizenship of their mothers, or were divested of that citizenship upon legitimation by their American fathers.

In sum, the historical sources provide scant evidence that federal officials in the 1930s and 1940s—who were responsible for the initial codification of the sex-based parental presence requirement—acted out of a particular concern about statelessness for American mothers' foreign-born nonmarital children. Instead, these sources support the conclusion that the sex-based distinctions in the derivative citizenship statute reflect then-prevailing views about mothers' and fathers' respective parental roles and responsibilities outside of marriage.

Laws premised on historically rooted gender-based assumptions concerning how men and women behave as parents—and how they *should* behave—have no place in the regulation of American citizenship. It is no longer acceptable for the federal government to maintain citizenship laws that perpetuate and reinforce gender-differentiated family roles by limiting individuals' rights as parents through sex-based classifications, *see Hibbs*, 538 U.S. at 736, especially when these laws have also been used for other constitutionally suspect ends. The historical record demonstrates, however, that the federal government has done just that in its regulation of derivative citizenship of foreign-born nonmarital children of American citizen parents.

Similarly, laws that unduly burden the recognition of the father-child relationship also run afoul of modern equal protection and due process principles. *See, e.g.*, *Trimble*, 430 U.S. at 769; *Stanley*, 405 U.S. at 651; *Weber*, 406 U.S. 171; *Caban*, 441 U.S. at 389. Yet the derivative citizenship statutes have created legal barriers to

father-child citizenship transmission that thwart the development of the father-child bond—even where the father has legally acknowledged and raised the child—thus separating fathers from children. These barriers are unbefitting a constitutional system that respects the dignity of the father-child relationship and that recognizes that "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody and management' of 'the children he has sired and raised.'" *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) (quoting *Stanley*, 405 U.S. at 651).

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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# APPENDIX

# APPENDIX

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# Supreme Court of the United States

LORETTA E. LYNCH,
ATTORNEY GENERAL,

*Petitioner,*

*v.*

LUIS RAMON MORALES-SANTANA,

*Respondent.*

*On Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF OF *AMICI CURIAE* SCHOLARS ON STATELESSNESS IN SUPPORT OF RESPONDENT

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## BRIEF OF AMICI CURIAE SCHOLARS ON STATELESSNESS, IN SUPPORT OF RESPONDENT[1]

## INTEREST OF AMICI

Amici have devoted much of their careers to teaching, writing about, and studying statelessness and related subjects, particularly refugees and asylum, migration, and citizenship laws, and they are familiar with the literature and studies of statelessness:

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[1] All parties have consented to the filing of this brief. Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made a monetary contribution to its preparation or submission.

sor of Law at the University of Michigan Law School from 1981 to 1997. From 1994 to 1997, he served as the General Counsel, and then Executive Associate Commissioner for Programs, at the United States Immigration and Naturalization Service. He has authored or co-authored eight books and numerous articles on constitutional law, citizenship and nationality, statelessness, and related aspects. More information is available at: http://www.law.columbia.edu/fac/T.%20Alexander_Aleinikoff.

- **David Baluarte** is an Associate Clinical Professor of Law and Director of the Immigrant Rights Clinic at the Washington and Lee University School of Law. He has worked with the UNHCR on a variety of initiatives to identify and protect stateless persons in the United States and the Caribbean. Most notably, he performed a study of statelessness in the United States that led to the publication of the UNHCR and Open Society Justice Initiative report "Citizens of Nowhere." He subsequently received support from the UNHCR to establish a pilot law clinic to provide pro bono legal services to stateless persons in the United States. He also directed a UNHCR-funded project to establish a nationality rights clinic at a law school in the Bahamas and acted as

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Additionally, Professors Rubenstein, Tiburcio, and Spiro have been honored by the UNHCR to serve on the independent world expert panel as jurors for the UNHCR-Tilburg University Award for Research on Statelessness, which has been given annually in three categories: undergraduate dissertation or equivalent, graduate masters dissertation, and doctoral dissertation.

Amici submit this brief to bring to the attention of this Court data and authorities relevant to the U.S. government's arguments that the discrimination against fathers entrenched in the Statute at Issue is justified by a concern for, and an effort to reduce, the risk of statelessness. The "Statute at Issue," as it was applied to Respondent, consists of Sections 201 and 205 of the Nationality Act of 1940

(the "1940 Act" or the "Nationality Act"), as amended by Section 309 in the Immigration and Nationality Act of 1952 (the "1952 Act" or the "McCarran-Walter Act," and such amendment, the "1952 Amendment"), and now codified as 8 U.S.C. §§ 1401 and 1409 (1958).

## INTRODUCTION AND SUMMARY OF ARGUMENT

1. A principal justification asserted by the government in its present brief ("U.S. Br.") for the discrimination against U.S.-citizen fathers in the Statute at Issue is to prevent or reduce statelessness of foreign-born non-marital children. Although its precise phrasing has varied on different occasions, its chief argument has been that the risk of statelessness for a foreign-born non-marital child is "substantially greater" or "much higher" when the U.S.-citizen parent is the mother rather than the father. U.S. Br. 33 ("substantially greater").[2]

Amici are aware of no study or compilation of data that establishes or supports this argument. The sources cited by the government in its present brief do not support it.

Viewed in totality, the evidence about the factors relevant to statelessness demonstrates that the

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[2] *See also* Brief for the United States in Opposition to Cert. 15 ("much higher"), *Flores-Villar v. United States*, 564 U.S. 210 (2011) (No. 09-5801) [hereinafter U.S. Br. Opp'n to Cert. in *Flores-Villar*].

risk of parenting stateless children abroad was, as of 1940 (when the Statute at Issue was enacted) and as of 1952 (when it was amended in the form applied to Respondent), and remains today, substantial for unmarried U.S. fathers, a risk perhaps greater than that for unmarried U.S. mothers. The relevant data indicate that the special residence requirements for U.S. fathers in the Statute at Issue may have enlarged in the past, and may continue today to enlarge, the pool of stateless children by hindering U.S. fathers who have undertaken the responsibilities of fatherhood in passing on their U.S. citizenship to their foreign-born non-marital children by legitimating them.

2. The government's subsidiary arguments concerning statelessness and the Statute at Issue are that "Congress was aware of and concerned about the problem of statelessness, and that Congress revised the relevant provisions in 1952 with the *specific intent* of reducing the risk that a child born out of wedlock abroad to a U.S.-citizen mother would be born stateless." U.S. Br. 36 (emphasis added).

Although it asserts that there is "abundant" evidence, *id.*, for what it terms this "clear" purpose, *id.* at 38, the government cites no direct evidence of such an intention. Instead, the government imputes to Congress a *sub silentio* "specific intent" to reduce statelessness. *Id.* at 36.

The government's imputation is unwarranted for many reasons. The words "stateless persons" or

"statelessness" do not appear in the 1952 Act or its legislative history in connection with this Amendment or in any substantive context. The government conflates the very different terms "displaced persons" and "stateless persons." Proceeding from that erroneous conflation, the government reaches back to a 1947 Senate resolution and a 1950 Senate report to infer that "addressing problems of statelessness" was "part and parcel" of the immigration "overhaul" contained in the 1952 Act. *Id.* at 37. That ignores the important intervening legislation (and extensive legislative histories) of statutes that *were* about displaced persons (and also "statelessness," to the extent appropriate). It also ignores the only paragraph in the 971-page 1950 Senate report pertinent to this case, as well as the data for the period between 1947 and 1952 about displaced persons and stateless persons. In sum, the government's imputation of a "specific intent" to address and reduce statelessness in the 1952 Amendment is an overlong reach. *Id.* at 36.

There exists an alternative, temporally related reason for the 1952 Amendment: to clarify Section 205 of the 1940 Act so as to resolve—permanently—a dispute that arose in 1951 between the U.S. Department of State and the U.S. Department of Justice about the correct interpretation of that Section, and to forestall the "many strange results," *In re M—*, 4 I. & N. Dec. 440, 445 (B.I.A. 1951), that the Board of Immigration Appeals said would occur if the State Department's misinterpretation were accepted.

3. The government several times ascribes consensus or unanimity among experts for propositions it advances (*e.g.*, "Experts in nationality and international law have long agreed . . . ."). U.S. Br. 35. These statements are either incorrect, oversimplifications, or incomplete.

Amici submit to the Court a proposition that does command a consensus among scholars and other workers in the field of statelessness: gender discrimination against either mothers or fathers in citizenship and nationality laws is a major cause of statelessness. Amici base this not only on their own research and on their interactions with colleagues at numerous conferences and symposia around the world, but also on the authoritative, published positions of the UNHCR. In 2014, the UNHCR undertook a ten-year program to eliminate statelessness by 2024, a key component of which is the elimination of gender discrimination in citizenship and nationality laws. *See, e.g.*, *The Campaign to End Statelessness: April 2016 Update* (reporting on a speech by the High Commissioner to the European Parliament to "highlight the issue of gender discrimination in the nationality laws of 27 countries—a major cause of statelessness globally");[3] *Background Note on Gender Equality, Nationality Laws and Statelessness* (cataloging types of laws and circumstances relating to fathers that "can cre-

[3] *The Campaign to End Statelessness: April 2016 Update*, United Nations High Commissioner for Refugees: The UN Refugees Agency, http://www.unhcr.org/ibelong/wp-content/uploads/Campaign-Update-April-2016.pdf.

ate statelessness" and concluding, "Ensuring gender equality in nationality laws can mitigate the risks of statelessness").[4]

## ARGUMENT

### I

### THERE WAS IN 1940 AND 1952—AND CONTINUES TO BE—A SUBSTANTIAL RISK OF STATELESSNESS FOR FOREIGN-BORN CHILDREN OF UNMARRIED U.S. FATHERS

The citizenship laws of many countries show that when U.S.-citizen fathers are hindered by the discriminatory residence strictures of the Statute at Issue in passing on their U.S. citizenship, there is a significant risk of statelessness for their foreign-born non-marital children. The interactions of the Statute at Issue with important categories of foreign citizenship laws invalidate the government's stated rationale for the discrimination imposed by the Statute at Issue.

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[4] *Background Note on Gender Equality, Nationality Laws and Statelessness*, United Nations High Commissioner for Refugees: The UN Refugees Agency (March 8, 2016), http://www.refworld.org/docid/56de83ca4.html.

### A. The Laws of Many Countries Created as of 1940 and 1952, and Still Create, a Risk of Statelessness for Foreign-Born, Non-Marital Children of U.S. Fathers

Such laws fall into several categories.

1. The government has acknowledged that when the law of another country does not permit a mother to assign her nationality to a non-marital child, its rationale for discrimination against fathers is undermined. *See* U.S. Br. Opp'n to Cert. in *Flores-Villar* 15 n.7. In fact, the laws of at least thirty countries did not, or currently do not, permit (in whole or substantial part) their citizen-mothers to assign their citizenship to non-marital children born within the mothers' countries.[5] Some do not allow the mother to do so in any circumstances; others do not allow the mother to do so when the alien father can be merely identified; others do not permit the mother to do so when the alien father so much as acknowledges that the child is his; others do not permit the mother to do so when the alien father legitimates the child; and some countries

[5] Amici have reviewed the relevant statutes of the countries cited herein, when available. Amici are not, however, in a position to report on the court decisions and administrative regulations of every country, which may serve in some cases to fill the gaps in the relevant statutes or perhaps even to contradict them. For the effects of court decisions and regulations, Amici have relied on standard secondary sources such as treatises and published studies as far as possible. Those secondary sources are identified in the Appendix, both generally, and on a country-by-country basis.

strip the child of the citizenship passed by the mother upon the alien father's legitimation of the child—whether or not the father is able to pass on his citizenship. It is important to bear in mind that the Statute at Issue does not come into play unless the U.S. father legitimated the child.

These countries include at least the following: **Afghanistan** (as of 1940) (requiring both parents to be citizens unless child takes up permanent residence after reaching majority) (A3)[6]; **Aruba** (as of 1940, under Dutch rule) (mother may not pass citizenship unless father has not acknowledged) (A10); **Bahrain** (currently)[7] (mother may not pass citizenship unless father is unknown or stateless or fatherhood is not substantiated) (A4); **Bhutan** (currently) (requiring both parents to be citizens) (A4); **Burma (Myanmar)** (currently) (requiring both parents to be citizens) (A4); **Cameroon** (currently) (mother may not pass citizenship unless father is stateless or of unknown nationality or did not filiate first) (A5); **Ceylon (Sri Lanka)** (as of 1952) (mother may not pass citizenship unless father has not legitimated) (A5); **China** (as of 1940) (mother may not pass citizenship unless

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[6] "A_" refers to the page number of the Appendix that contains citations to the relevant statute, constitution, and/or secondary source for each country.

[7] "Currently" refers to the law existing as of 2010, when this Court last reviewed the issues in this case, or, in several instances, as of 2016, if there has been a material change in that country's laws since 2010 that affects the point in the text.

father is unknown or stateless or has not legitimated) (A5); **Egypt** (as of 1940) (mother may not pass citizenship if paternity is established) (A5); **Finland** (as of 1940) (requiring both parents to be citizens, except that if father of non-marital child loses Finnish nationality, in certain circumstances child retains citizenship of Finnish mother) (A6); **Germany** (as of 1940) (citizenship through mother lost upon father's legitimation) (A6); **Iran** (as of 1940) (mother may not pass citizenship at birth, though child can apply for citizenship at age 18) (A7); **Iraq** (1940) (mother may not pass citizenship at birth, though child can obtain citizenship after reaching age of majority) (A7); **Japan** (as of 1940) (mother may not pass citizenship unless father is stateless or cannot be identified) (A8); **Trans-Jordan** (as of 1940) (mother may not pass citizenship at birth) (A8); **Korea** (as of 1952) (mother may not pass citizenship unless father is unknown or stateless) (A8); **Kuwait** (currently) (mother may not ask for permission to pass citizenship unless father is unknown or father's kinship has not been legally established) (A8); **Lebanon** (as of 1940) (mother may not pass citizenship unless the father has not filiated) (A8); the **Netherlands** (as of 1940) (mother may not pass citizenship unless father has not acknowledged) (A10); **Oman** (currently) (mother may not pass citizenship unless father is unknown or stateless) (A10); **Qatar** (currently) (mother may not pass citizenship) (A11); **Romania** (as of 1940)

(citizenship through mother lost upon legitimation) (A11); **Saudi Arabia** (currently) (mother may not pass citizenship at birth unless father is stateless or of unknown nationality, but child can apply for citizenship after reaching majority if permanent resident) (A11); **Sudan** (currently) (mother may not pass citizenship unless the father has not filiated) (A12); **Suriname** (as of 1940, under Dutch rule) (mother may not pass citizenship if child is acknowledged) (A10); **Swaziland** (currently) (mother may not pass citizenship unless father fails to claim or adopt) (A12); **Taiwan** (as of 1952) (mother may not pass citizenship unless father is unknown or stateless or has not legitimated) (A13); **Togo** (currently) (mother may not pass citizenship unless father is stateless or of unknown nationality) (A13); **United Arab Emirates** (currently) (mother may not pass citizenship unless father is unknown) (A13); and **Yemen** (currently) (mother may not pass citizenship unless father is not legally established or is stateless or of unknown nationality) (A15).[8]

In all of these countries, there is a severe or moderate risk that the child of a U.S. father and a local mother will be stateless, unless the father can sat-

[8] In some of these countries, the mother may nevertheless commence administrative proceedings, which can be very onerous, and which, if successful, could restore the child's citizenship through the mother. At the same time, as stated in the text, some countries would divest the child of its mother's citizenship if the child were legitimated by an alien father.

isfy the discriminatory residence tests in the Statute at Issue.[9]

2. Also significant: as of 1940, the statutes of as many as forty-five countries (including nearly all of the British Commonwealth dominions and colonies which extended the common British subject status and not independent citizenship) did not permit their female citizens to assign nationality to a non-marital child born outside the subject country with a foreign father. Several countries retain such a provision in their laws today.

The countries that then posed, or now pose, this second category of risk of statelessness for non-marital children born abroad of U.S.-citizen fathers include at least the following: **Andorra** (as of 1940) (mother may not pass citizenship to foreign-born children) (A3); **Australia** (as of 1940) (mother may not pass nationality to foreign-born children) (A3); **Brunei** (currently) (mother may not pass citizenship to foreign-born children) (A4); **Canada** (as of 1940) (mother may not pass nationality to foreign-born children) (A5); **Haiti** (as of 1952) (mother may

[9] Laws other than nationality/citizenship laws (such as criminal adultery laws) can also substantially impair a mother's ability to pass on her citizenship to a child, thereby furthering the need for ease of access to a father's nationality, instead of imposing special burdens upon him such as those imposed by the Statute at Issue. *See generally* Betsy Fisher, *Why Non-Marital Children in the MENA Region face a Risk of Statelessness*, Harvard Human Rights Journal Online, January 6, 2015, http://harvardhrj.com/2015/01/why-non-marital-children-in-the-mena-region-face-a-risk-of-statelessness/.

not pass citizenship to foreign-born children unless father does not recognize child) (A6); **Indonesia** (as of 1952) (*jus soli* but mother may not pass citizenship unless she is sole legally acknowledged parent) (A6-7); **Ireland** (as of 1940) (mother may not pass citizenship to foreign-born children) (A7); **Israel** (currently) (citizenship by descent is limited to only one generation born abroad) (A7); **Lebanon** (as of 1940) (mother may not pass citizenship unless the father has not filiated) (A8); **Liberia** (as of 1940) (mother may not pass citizenship to foreign-born child) (A8); **Libya** (as of 1940) (mother may not pass citizenship to foreign-born children on an equal basis as father) (A9); **Mauritania** (currently) (mother may not pass citizenship to foreign-born children at birth except in very limited circumstances, but child may apply for citizenship in the year preceding the age of majority) (A9); **Mexico** (as of 1940) (mother may not pass citizenship to foreign-born children unless father is unknown) (A9); **Nepal** (as of 1952) (mother may not pass citizenship to foreign-born children) (A9); **New Zealand** (as of 1940) (mother may not pass nationality to foreign-born children) (A10); **Pakistan** (including the territory that later became **Bangladesh**) (1940 and 1952) (first under U.K. law, and later under independent domestic law, mother may not pass nationality to foreign-born children) (A10); **Somalia** (currently) (mother may not pass citizenship to foreign-born children) (A11); **South Africa** (as of 1940) (mother may not pass citizenship to foreign-born children) (A12); **Suriname** (as of 1940, under Dutch rule) (mother

may not pass citizenship if the child is acknowledged by father) (A10); **Syria** (currently) (mother may not pass citizenship to foreign-born children) (A12); **Thailand** (as of 1940) (mother may not pass citizenship to foreign-born children unless father is unknown) (A13); **Vietnam** (as of 1940) (mother may not pass citizenship to foreign-born children in a non–*jus soli* country unless father is unknown) (A14); and the **United Kingdom** (and at least the following British Commonwealth colonies and territories[10] all of which applied U.K. law all as of 1940: the **Bahamas, Barbados, Belize, Bermuda, Botswana, British Virgin Islands, Cayman Islands, Gambia, Ghana, Guyana, Hong Kong, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Malta, Mauritius, Nigeria, Palestine, Seychelles, Sierra Leone, Singapore, Sudan, Swaziland; Tanzania, Trinidad & Tobago, Uganda, Zambia,** and **Zimbabwe**) (mother may not pass nationality to foreign-born children) (A14).

This category of countries was significant as of 1940 and 1952 because of the large numbers of refugees outside their home countries created by World War II and its aftermath. *See infra* p. 29 and note 30. It remains significant today because of the many people from some of those countries who

[10] This brief uses the contemporary names of these states, some of which had different colonial names in 1940.

live abroad either as migrant workers or refugees (including stateless refugees)—*e.g.*, Jamaica, Kenya, Lebanon, Mauritania, and Somalia.[11] These problems have all been magnified by the conflicts in the Middle East and the large numbers of refugees they have created, particularly from Syria.

In all of these countries as well, the impediments to the mother's ability to pass on citizenship argue for ease of access for the U.S. father to pass on citizenship. Therefore, again, the discriminatory residence burdens on the U.S. father in the Statute at Issue do not reduce the risk of statelessness but potentially exacerbate it.

3. A third category of other nations' laws—more precisely, the absence of laws—also poses a risk of statelessness for foreign-born non-marital children of U.S.-citizen fathers.

As the 1934 Seckler-Hudson treatise points out, "an absence of law" regarding the status of illegiti-

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[11] *See, e.g.*, Div. of Programme Support & Mgmt., *2009 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons*, UNHCR, (June 15, 2010), http://www.unhcr.org/4c11f0be9.pdf [hereinafter UNHCR 2009 Global Trends] (listing Somalia as the third largest producer of refugees as of 2008 with 678,300 refugees); Prachi Mishra, *Emigration and Brain Drain: Evidence From the Caribbean* (IMF Working Paper, No. WP/06/25, 2006), *available at* http://www.imf.org/external/pubs/ft/wp/2006/wp0625.pdf (estimating that over 75% of the educated labor force in Jamaica has migrated to OECD Member Countries).

mate children creates "uncertain[ty]" and "possibilities that the child may, without its knowledge, choice, or selection, be an infant without a country." Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* 217-18 (1934) [hereinafter Seckler-Hudson].

The frequency of such regimes in the late 1930s is indicated in Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935) [hereinafter Sandifer]. Sandifer notes that "the statutory law[s] of about half the [79] states [he] studied"—*i.e.*, about forty countries—make no specific provision for the nationality of non-marital children. *Id.* at 256, 258.

The "uncertainty" cited by Seckler-Hudson alone makes the discriminatory residency burdens placed upon U.S. fathers by the Statute at Issue a potential source of concern about statelessness. Beyond that uncertainty, the fact that the default rule in the majority of *jus sanguinis* countries is descent of citizenship through the father, *see* Sandifer at 254, makes it more likely that even where there is no express law about non-marital children, the citizenship of the father would be applied by an official to non-marital children, again posing an increased risk for U.S. fathers, who must meet the heightened residency requirements of the Statute at Issue.

## B. The Presence of Large Numbers of Stateless Women Created in 1940 and 1952—and Creates Today—a Risk of Statelessness for Foreign-Born Non-Marital Children of U.S. Fathers

When the mother is stateless, the residence burdens imposed upon U.S. fathers by the Statute at Issue create a self-evident risk of stateless children—whether the laws of the country of birth look to the mother or to the father in determining the citizenship of a non-marital child.

It has been estimated that there are millions of stateless persons around the globe.[12] Whatever the precise contours of the citizenship laws of any country in which U.S.-citizen males are present, the presence of large numbers of stateless women poses a risk of statelessness for the foreign-born non-marital children of U.S. fathers. That risk was especially severe in the period starting before World War II and through the 1940s. The dislocations of war, wartime changes in citizenship laws, the stripping of citizenship rights from some citizens, and other factors created unusually large numbers (although the published estimates can vary wildly) of female refugees and stateless

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[12] *See, e.g.*, UNHCR 2009 Global Trends, *supra* note 11. *See also* Laura van Waas, *Nationality Matters: Statelessness Under International Law* 10 (2008) (noting that although it is "unlikely" a precise figure on stateless persons will ever be available, "all estimates point towards statelessness being an issue of global proportions and reach").

women in Europe and Asia, and more recently from the Middle East—precisely the circumstances in which the discriminatory provisions of the Statute at Issue exacerbate the risk of statelessness for children of U.S. fathers.

### C. The Sources Cited by the Government Do Not Support Its Argument that Non-Marital Children of U.S. Mothers Were or Are at "Greater Risk" of Statelessness

The Government relies on the following sources:

1. Seckler-Hudson (1934). The government quotation, U.S. Br. 35, of a portion of a sentence from page 224 of this text fails to note that the quote is from a paragraph listing four additional situations that can be problematic in terms of statelessness, including situations applicable to U.S.-citizen fathers. And the paragraphs preceding the government's quote identify additional problematic categories (including the one discussed *supra* pp. 21-22 relating to the absence of laws).

It bears emphasis, furthermore, that the author of the text endorsed legislation proposed in the early 1930s providing that any child, "legitimate or illegitimate," born abroad of a U.S. citizen, mother *or* father, would be a U.S. citizen, subject to a simple residency test, equal in duration for mother and father. Seckler-Hudson at 222 (quoting H.R. 5489, 72nd Cong. (1931)).

2. Sandifer (1935). The government first cites Sandifer for the proposition that the laws of twenty-

nine of thirty countries provided that a child born out of wedlock acquired the citizenship of the mother and in nineteen of those twenty-nine, a child acquired the citizenship of the father upon legitimation. U.S. Br. 29. That may or may not be substantially correct—as far as it goes (*see supra* pp. 15-20 discussing impediments to acquiring citizenship from the mother). But the government's second reference to Sandifer, U.S. Br. 34, attributes to him a different statement, one Sandifer did not make—*i.e.*, that "the only parent legally *recognized as the child's parent* at the time of the birth usually was the mother" (emphasis added). Both of these references to Sandifer ignore the fact that Sandifer never mentions statelessness at all and the fact that, as of 1940, a substantial number of countries legally prevented the mother—in whole or in part—from transmitting her citizenship to a child born out of wedlock (*supra* pp. 15-18). Nor does the government mention Sandifer's recognition that about forty countries had no law concerning the citizenship status of children born out of wedlock—further creating a risk of statelessness.

Finally, Sandifer states that the majority rule with respect to marital children is that the father's nationality governs, noting that sixteen countries followed this rule for non-marital children. Sandifer at 254, 259. This too creates, under the discriminatory residence requirements of the Statute at Issue, a greater risk of statelessness for U.S.-citizen fathers of non-marital children.

3. Hall; Weis; and Flournoy & Hudson.[13] Hall's 1880 treatise is quoted or referenced three times by the government, U.S. Br. 28, 35, and 46, for the proposition that "almost everywhere" the nationality of illegitimate children comes from the mother because "the mother is their *only possible* root of nationality" (emphasis added).[14] Weis, U.S. Br. 29, 46, and Flournoy & Hudson, U.S. Br. 30, are cited for a similar assertion, although neither claims such inevitability. In either form, this assertion overlooks the many countries that prohibit or severely limit the mother's ability to pass on her citizenship (*supra* pp. 15-20). It also ignores the availability of legitimation by the father (a prerequisite for application of the Statute at Issue), and, therefore, the fact that, as of 1940, it would be the father's nationality that would pass to the child in the majority of states. *See* Sandifer, *supra*, at 254, 259.

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[13] William Edward Hall, *A Treatise on International Law* (1st ed. 1880) [hereinafter Hall]; P. Weis, *Nationality and Statelessness in International Law* (1956) [hereinafter Weis]; Richard W. Flournoy & Manley O. Hudson, *A Collection of Nationality Laws of Various Countries, as Contained in Constitutions, Statutes and Treaties* (1929) [hereinafter Flournoy & Hudson].

[14] The government cites a 1924 edition of Hall's treatise, but this quote appeared *in haec verba* in the first edition, published in 1880. William Edward Hall, *A Treatise on International Law* 188-89 (1st ed. 1880), *available at* http://catalog.hathitrust.org/Record/001155162.

4. International Union for Child Welfare (1947).[15] The government cites this study for its statement that "one of the primary categories of stateless children is '[c]hildren who are directly subjected to the consequences of the conflict between the *jus sanguinis* and the *jus soli*.'" U.S. Br. 34-35. Whether or not this is correct, it does not support the proposition that children of U.S. mothers are at a greater risk of statelessness than those of U.S. fathers.

5. Committee on Nationality (1950).[16] Page 57 of this report is cited by the government, U.S. Br. 35, but it is difficult to understand the relevance to this case of a quotation such as "consideration of the nationality laws of the various states . . . is difficult for various reasons." The reference to this report may have been intended to be read together with yet another cite to Hall's nineteenth-century text to bolster the government's conclusion that "[e]xperts in nationality and international law have long agreed that the risk of being born stateless was *particularly high* for a child born out of wedlock in a *jus sanguinis* country unless the child could obtain his mother's citizenship." U.S. Br. 35 (emphasis added). Amici are unaware of such an

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[15] "Stateless Children: A Comparative Study of National Legislations and Suggested Solutions to the Problem of Statelessness," *Int'l Union for Child Welfare* (1947).

[16] Comm. on Nationality & Statelessness of the Am. Branch of the Int'l Law Assoc., "Report on Nationality and Statelessness," 1950 Committee Report of the American Branch of the International Law Association (1950).

agreement, longstanding or otherwise. As for its substance, that sentence implicitly contradicts or renders irrelevant the assertion by the government that it is the law everywhere that the mother of a non-marital child passes on her citizenship to the child.

## II

## THE EVIDENCE DOES NOT SUPPORT THE GOVERNMENT'S IMPUTATION TO CONGRESS THAT IT ENACTED THE 1952 AMENDMENT WITH THE "SPECIFIC INTENT" TO REDUCE THE RISK THAT A CHILD BORN OUT OF WEDLOCK ABROAD TO A U.S.-CITIZEN MOTHER WOULD BE BORN STATELESS

The government argues: "Abundant evidence demonstrates that Congress was aware of and concerned about the problem of statelessness, and that Congress revised the relevant provisions [of the 1940 Act] in 1952 with the specific intent of reducing the risk that a child born out of wedlock abroad to a U.S.-citizen mother would be born stateless." U.S. Br. 36.

The government cites no direct evidence in support of such a "specific intent." *Id.* Instead, the government uses language indicative of post hoc attribution to impute that intent to Congress. *See, e.g.*, U.S. Br. 38 ("Congress understood"); *see also id.* at 26, 29.

The relevant chronology, the terms of the relevant congressional resolution, reports, statutes, and their legislative history, and relevant data from 1947 to 1952 negate the government's imputation. All point to a different, simpler congressional purpose.

## Chronology

1. On July 26, 1947, the Senate adopted Resolution 137, calling for a report on displaced persons and also for a comprehensive review of the nation's immigration laws. S. Res. No. 137, 80th Cong. (1947).

2. On March 2, 1948, the Senate Judiciary Committee report on the subject of displaced persons, pursuant to Resolution 137, was published.

3. On June 25, 1948, Congress passed the Displaced Persons Act of 1948 (the "1948 Act"), Pub. L. No. 80-774, 62 Stat. 1009 (1948), which allowed the immigration of 200,000 European displaced persons into the United States by the end of 1950. *Id.* at § 3(a). The statute and legislative history contain many references to displaced persons and some references to stateless persons as well. The legislative history indicates:

    - At the end of WWII, there were 8,000,000 displaced persons in Europe, 7,000,000 of whom were repa-

triated to their home countries by mid-1947. S. Rep. No. 80-950 at 2037 (1948). A "displaced person" means a person who *de facto* "has been driven from his homeland or place of residence by war, internal upheaval or national disaster." *American Heritage Dictionary* (5th ed. 2001).

- There remained, as of 1947, approximately 800,000 displaced persons in "DP" camps, principally in Germany, but also in Austria and Italy.[17] Most were listed in Congressional documents as nationals of various European countries; a small fraction were listed as "stateless."[18] A "stateless person," as relates to this case and as used by the government in its brief, refers to the *de jure* status of a person who is "not considered as a national by any State under the operation of its law."[19]

4. On March 29, 1950, a 971-page report of the Senate Judiciary Committee (the

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[17] Hearing Before the Subcommittee on Immigration and Naturalization, Senate Judiciary Committee, 80th Congress 124 (1947).

[18] *E.g.*, *id.*

[19] Convention Relating to the Status of Stateless Persons, art. 1, Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960).

"1950 Report"), the second of two reports responsive to Resolution 137, was published. S. Rep. No. 81-1515 (1950). It included a few minor, non-substantive references to "displaced persons" or "stateless" persons and one substantive reference, *id.* at 672, to a problem of statelessness, relating to an arcane issue about persons born in American Samoa of British Samoan heritage.

5. On June 16, 1950, after many criticisms of Congress for allegedly doing too little for victims of Nazi persecution in the 1948 Act, Congress passed an amendment. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948), amended by Pub. L. No. 81-555, 64 Stat. 219 (1950). The amendment to the 1948 Act allowed 215,000 additional displaced persons to emigrate to the U.S. by the end of 1952. Pub. L. No. 81-555, §§ 3, 8, 10, 64 Stat. 219 (1950). The extensive legislative history of the amendment contains many references to displaced persons and several references to stateless persons among them. This statute, like the 1948 Act, implicitly treated nearly all of the covered prospective immigrants to the U.S. as nationals of their country of origin (hence, not "stateless") as their emigration to the U.S. was to be counted against the existing immigration quotas applicable to each

of those countries. Pub. L. No. 81-555, §§ 4, 10, 64 Stat. 219 (1950). H.R. Rep. No. 80-1854 at 1-3 (1948).

6. In late 1950 and during 1951, the U.S. Department of State officially disclosed its interpretation of Section 205a of the 1940 Act, which was contrary to that of the U.S. Department of Justice. *See In re M—*, 4 I. & N. Dec. 440 (B.I.A. 1951). In August 1951, the Board of Immigration Appeals published its decision, cited by the government, U.S. Br. 37, sharply ruling against the State Department's interpretation. *Id.*

7. In June 1952, Congress passed the McCarran-Walter Act. The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952). After Congress overrode President Truman's veto, the 1952 Act became effective in December 1952. A word search of the 120-page statute and its extensive legislative history reveals scant, non-substantive, and—for these purposes—irrelevant references to "displaced persons."[20] There are a handful of non-substantive references to statelessness, including one administrative reference—in Section 281, relating to visa application fees.

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[20] Most were references to the Displaced Persons Act of 1948, in a procedural or technical context.

**Analysis**

1. In its brief, the government begins attributing a specific intent to Congress to address the risk of statelessness for children of U.S.-citizen mothers in the 1952 Act by citing the 1947 Senate Resolution No. 137, and quoting from it the phrase "displaced persons." U.S. Br. 36. The government then proceeds to conflate "displaced persons" with "stateless persons" or "statelessness"—terms having quite different meanings—but treating the former as a complete proxy for the latter. *Id.* at 37. The government then jumps ahead five years in time and concludes, "Congress thus viewed the task of addressing problems of statelessness as *part and parcel* of the 1952 overhaul of the Nation's immigration and nationality laws." *Id.* (emphasis added).

The intervening events mentioned above negate this conclusion, by their stark contrast with the "1952 overhaul"—the government does not refer to the 1948 Judiciary Committee Report on displaced persons, the Displaced Persons Act of 1948 (and its legislative history), the 1950 lengthy amendment to the 1948 Act (and all of its legislative history), or the 971-page 1950 Senate Judiciary Committee report.[21] Unlike these reports and statutes, neither

[21] Later in its brief the government does refer once to the 1950 Report, erroneously asserting that at page 676 the Judiciary Committee "explained" the meaning of words quoted from Section 205 of the Nationality Act. In fact, the Judiciary Committee merely described Section 205 (neutrally and almost *in haec verba*) without "explanation," as part of a broader summary of who can be a citizen.

the 1952 Act itself nor the extensive supporting report of Senator McCarran cited by the government (the "1952 Report"), U.S. Br. 38-39, or anything else in the legislative history of the 1952 Act, includes any substantive mention of the word "stateless." Similarly, there is a paucity of substantive references to "displaced persons" in the 1952 Act and its legislative history.

There is ample reason for this paucity: neither "displaced persons" nor "stateless persons" were "part and parcel" of the 1952 Act as, by that time, their plight had been dramatically alleviated. Under the terms of the Displaced Persons Act of 1948, and as amended in 1950, the United States had absorbed (and would absorb by year-end 1952) over 400,000 displaced persons. By 1952, Australia had absorbed 170,000 displaced persons, most of these from Europe;[22] Israel had absorbed over 130,000 by that time;[23] and Canada, South Africa, and several Caribbean and Latin American countries, none of which had been a devastated war zone, had absorbed many thousands more.[24] The

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[22] Jayne Persian, *Displaced Persons and the Politics of International Categorisation(s)*, 58 Australian Journal of Politics and History 481 (2012).

[23] M. Web, *Guide to the Records of the Displaced Persons Camps and Centers in Germany 1945 – 1952*, Center for Jewish History (2014), http://findingaids.cjh.org/?pID=2142304 [hereinafter Web].

[24] *See, e.g.*, *Displaced Persons*, United States Holocaust Memorial Museum, https://www.ushmm.org/wlc/en/article.php?ModuleId=10005462 [hereinafter Displaced Persons—

last displaced person in the British sector of post-war Germany departed on August 15, 1951[25] and "[a]lmost all of the DP camps [throughout Europe] were closed by 1952."[26] As regards the group of Jewish Holocaust survivors, which had perhaps the most exigent need for displaced person or statelessness relief, the YIVO Institute for Jewish Research concludes, "The establishment of State of Israel in May 1948, aided by the introduction in the U.S. of the Displaced Persons Act of 1948 brought about the solution to the DP problem."[27] The overwhelming majority (perhaps even virtually all) of the remaining European displaced persons, whether they had been in DP camps or not, and whether stateless or not, had been or would be resettled by the end of 1952. The 1952 McCarran-Walter Act therefore was about different matters altogether.

2. In one instance, the 1952 Act did address an identifiable problem of "statelessness." That one instance further undermines the government's argument. The issue was this: in 1900, American Samoa became a U.S. possession and its residents

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USHMM]; *Refuge in Latin America*, United States Holocaust Memorial Museum, https://www.ushmm.org/wlc/en/article.php?ModuleId=10007824; *Brief History of Canada's Response to Refugees*, Canadian Council for Refugees, http://ccrweb.ca/sites/ccrweb.ca/files/static-files/canadarefugeeshistory.htm.

[25] Web, *supra* note 23.

[26] Displaced Persons—USHMM, *supra* note 24.

[27] Web, *supra* note 23.

and their progeny became U.S. nationals, but not citizens. Persons from British Samoa who later migrated to American Samoa—and their progeny, even if the progeny were born in American Samoa—were stateless by dint of the interaction of U.S. and British law at the time. And so, in the example cited to the Judiciary Committee in 1950, a soldier born in American Samoa who fought in the U.S. Armed Forces against Japan, but *one* of whose forebears came from British Samoa after 1900, was therefore not a U.S. national and could not migrate to Hawaii. S. Rep. No. 81-1515, at 672 (1950). The Committee suggested a statutory solution to such unintended statelessness consequences in its 1950 Report and that suggestion later was adopted in Section 308 of the 1952 Act. The 1950 Report used the word "stateless" repeatedly as to this issue—thus showing that when Congress had a "clear" purpose, U.S. Br. 38, to address a problem of statelessness, it said so.

3. The government nevertheless cites and underscores a sentence from the 1952 Report submitted by Senator McCarran describing the proposed 1952 Amendment. U.S. Br. 38, 39. It asserts that this one sentence, particularly the phrase "*insures that the child shall have a nationality at birth*," evinces Congress's "clear" purpose, *id.* at 38, for the 1952 Amendment to reduce statelessness.

The government's focus is misdirected. Properly viewed in context, the "insur[ance]" referred to was insurance against the undue *revocation* of the child's U.S. citizenship that it had previously

acquired "at birth"—a revocation never intended by Congress in the 1940 Act. Under the express words of Section 205 of the 1940 Act, a foreign-born non-marital child of a U.S.-citizen mother *already* acquired U.S. citizenship *at birth* from the mother. But the Department of State contended in 1951 that that child's citizenship was to be *divested* by Section 205 if, years later, the father legitimated the child. The U.S. Department of Justice, and the Board of Immigration Appeals, disagreed. In its August 1951 decision, the tribunal wrote that it could not

> believ[e] that it was the intent of Congress to first bestow United States citizenship status upon such child at birth and then, because of legitimation or adjudication of paternity during minority, take that citizenship status away and make the child an alien.[28]

This decision was published shortly before introduction of the bill that ultimately became Section 309(c) of the 1952 Act, which amended Section 205

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[28] *In re M—*, 4 I. & N. Dec. 440, 445 (B.I.A. 1951). As the use of the word "alien" in this quotation from the tribunal's decision makes plain, even adoption of the rejected State Department misinterpretation of Section 205 of the 1940 Act would not have meant that "Section 205 on its face present[ed] a real risk of statelessness." U.S. Br. 37. The child had been born in Portugal, a *jus soli* country, to a father of Portuguese nationality. *In re M—* at 441. Upon revocation of U.S. citizenship, the child thus would have become a U.S. alien with Portuguese nationality; the child would not have become stateless.

of the 1940 Act by supplanting the latter with the former.[29]

4. It requires no reach at all to conclude that the 1952 Amendment was but an unexceptional exercise of Congress' role to enact a clarifying amendment of an existing statute in order to permanently resolve a "definite difference of opinion," *In re M*— at 443, between two agencies about an interpretation of that statute—and, in this instance, to resolve it in a way to avoid the "many strange results," *id.* at 445, that the State Department's interpretation of the 1940 Act would have entailed (including, for example, the ongoing discouragement of fathers from marrying the U.S.-citizen mothers of their foreign-born children or legitimating those children).

## CONCLUSION

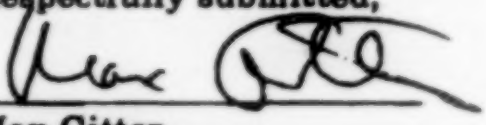
There is no support for the government's assertion that the risk of statelessness for a foreign born, non-marital child was or is substantially greater when the U.S.-citizen parent is the mother rather than the father. There is a more than reasonable possibility that the discriminatory residence burdens imposed upon U.S. fathers by the Statute at Issue increased, and continue to increase, the incidence of statelessness for foreign-

[29] The tribunal ruled on August 3, 1951; the Amendment containing Section 309(c) of the Act entered the bill in October 1951, when it was introduced. H.R. 5678, 82nd Cong. § 309 (1951).

born, non-marital children with one U.S.-citizen parent. Nor is there support for the argument that the 1952 Amendment was intended to remedy statelessness risks for foreign-born, non-marital children of U.S.-citizen mothers.

The judgment below should be affirmed.

Respectfully submitted,

/s/ 

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# APPENDIX

# APPENDIX OF FOREIGN LAWS

## I. *Key to Secondary Sources Cited*

- *Acquisition and Loss of Nationality, Policies and Trends in 15 European States, Vol. 2: Country Analyses* (Rainer Bauböck, Eva Ersbøll, Kees Groenendijk & Harald Waldrauch eds., 2007) [hereinafter "Bauböck 2007"].
- Julia Breslin & Toby Jones, *Qatar*, *in Women's Rights in the Middle East and North Africa* 397 (Sanja Kelly & Julia Breslin eds., 2010) [hereinafter "Breslin"].
- Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, *2009 Human Rights Report: Qatar* (Mar. 11, 2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136078.htm [hereinafter "State Department Qatar"].
- *Citizenship Policies in the New Europe* (Rainer Bauböck, Bernhard Perchinig & Wiebke Sievers eds., expanded & updated ed. 2009) [hereinafter "Bauböck 2009"].
- *The Civil Code of Iran* (Mostafa Shahabi trans., 2007) [hereinafter "Shahabi"].
- *A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties* (Richard W. Flournoy, Jr. & Manley O. Hudson eds., 1929) [hereinafter "Flournoy"].

- Comm. on the Elimination of Discrimination against Women, *Combined initial and second periodic reports of states parties: Bahrain*, U.N. Doc. CEDAW/C/BHR/2 (Nov. 12, 2007), *available at* http://www.bayefsky.com//reports/bahrain_cedaw_c_bhr_2.pdf [hereinafter "CEDAW Bahrain"].
- Comm. on the Elimination of Discrimination against Women, *Initial periodic report of States parties: United Arab Emirates*, U.N. Doc. CEDAW/C/ARE/1 (Sept. 17, 2008), *available at* http://www.refworld.org/docid/4970841f2.html [hereinafter "CEDAW UAE"].
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- Div. for the Dev. and Codification of Int'l Law, U.N. Legal Dep't, *Laws Concerning Nationality*, U.N. Doc. ST/LEG/SER.B/4, U.N. Sales No. 54.V.1 (1954) [hereinafter "Laws Concerning Nationality"].
- Laurie Fransman, *British Nationality Law* (2d ed. 1998) [hereinafter "Fransman"].
- J. Mervyn Jones, *British Nationality Law and Practice* (1947) [hereinafter "Jones"].

- Bronwen Manby, Open Society Inst., *Citizenship Law in Africa: A Comparative Study* (2010), *available at* http://www.unhcr.org/4cbc60ce6.pdf [hereinafter "Manby"].
- *Nationality and International Law in Asian Perspective* (Ko Swan Sik ed., 1990) [hereinafter "Sik"].
- Gianluca P. Parolin, *Citizenship in the Arab World* (2009) [hereinafter "Parolin"].

## II. *Country by Country Citations*

### AFGHANISTAN

- Afghan Nationality Law of November 8, 1936, ch. I, arts. 2, 4, 5, 11-12, *reprinted in* Laws Concerning Nationality at 1-4.

### ANDORRA

- Décret du 17 Juin 1939, June 17, 1939, arts. I-II, VI (Andorra), *reprinted in* Laws Concerning Nationality at 9-10.

### AUSTRALIA

- Nationality Act, 1920-1925, § 6 (Austl.), *reprinted in* Flournoy at 88-103, *discussed in* Jones at 270.

**BAHRAIN**

- Bahraini Citizenship Act, Sept. 16, 1963, arts. 4-5 (as amended 1981), *available at* http://www.unhcr.org/refworld/docid/3fb9f34f4.html.
- CEDAW Bahrain ¶ 78 (discussing the Bahraini Citizenship Act as amended through 1989).

**BHUTAN**

- Bhutan Citizenship Act, 1985, June 10, 1985, *available at* http://www.nab.gov.bt/assets/uploads/docs/acts/2014/Bhutan_Citizen_Act_1985Eng.pdf.

**BRUNEI**

- Brunei Nationality Act, 1984 ed., ch. 15, art. 4(1) (as amended 2002), *available at* http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/97408/115570/F-2002352985/BRN97408.pdf.

**BURMA (Myanmar)**

- The Pyithu Hluttaw Law No. 4 of 1982 [Burma Citizenship Law], Oct. 15, 1982, ch. II, arts. 5-7, *available at* http://www.unhcr.org/refworld/docid/3ae6b4f71b.html.

**CAMEROON**

- Loi n° 1968-LF-3 du 11 juin 1968, Portant code de la nationalité camerounaise, July 15, 1968, §§ 6-8, 1968-LF-3 (Cameroon), *available at* http://www.refworld.org/docid/3ae6b4db1c.html.

**CANADA**

- Canadian Nationals Act of 1921, R.S.C., ch. 21 (1927) (in effect in 1940), *reprinted in* Flournoy at 86-87.

**CEYLON (Sri Lanka)**

- Citizenship Act, No. 18 of 21 September 1948, §§ 4, 5, 9, *as amended by* Citizenship Amendment Act, No. 40 of 1950 (Ceylon), *reprinted in* Laws Concerning Nationality at 83-91.

**CHINA**

- Nationality Act of 5 February 1929, chs. 1-3 (in force until 1949) (China), *reprinted in* Laws Concerning Nationality at 94-97.

**EGYPT**

- Decree Law No. 19, of February 27, 1929 (Egypt), *reprinted in* Flournoy at 225-30.

**FINLAND**

- Constitution of July 17, 1919, art. 4 (Fin.), *reprinted in* Flournoy at 237, *discussed in* Bauböck 2007 at 154.
- Law of June 17, 1927 Regarding the Loss of Finnish Citizenship, art. 2 (Fin.), *reprinted in* Flournoy at 239-40, *discussed in* Bauböck 2007 at 154.

**GERMANY**

- Law of Nationality of July 22, 1913, RGBI. 46 at 583, §§ 4-6, 17 (Germany), *reprinted in* Flournoy at 306-13.

**HAITI**

- Constitution of the Republic of Haiti, 1946, art. 4 (Professor David Baluarte's translation).

**INDIA**

- Sik at 69-70 (explaining applicability of U.K. law in 1940); Jones at 114, 232-35, 286-87 (same).

**INDONESIA**

- Act No. 3 of 10 April 1946 Concerning Citizens and Residents of Indonesia, arts. 1, 3 (Indon.), *reprinted in* Laws Concerning Nationality at 230-234, *discussed in* Sik at

34-35 (explaining law's applicability on federal level was unclear between 1949 and 1958 and was applied on a local level).

**IRAN**

- Qanun-i Madani [Civil Code], May 23, 1928, art. 976 (in effect in 1940) (Iran), *translated in* Shahabi at 113-14.

**IRAQ**

- Nationality Law of October 9, 1924, arts. 8-9 (in effect in 1940) (Iraq), *reprinted in* Laws Concerning Nationality at 241-42.

**IRELAND**

- Irish Nationality and Citizenship Act, 1935 (Act. No. 13/1935), §§ 2(1)-2(2), *reprinted in* Jones at 338-60, *discussed in* Bauböck 2007 at 295.

**ISRAEL**

- Nationality Law, 5712-1952, art. 46, LSI 50 (1951-52) (through 1980 amendments; art. 4 in effect in 2010) (Isr.), *available at* http://www.unhcr.org/refworld/docid/3ae6b4ec20.html.

**JAPAN**

- Law No. 66 of 1899 (last amended 1924) (Japan), *reprinted in* Flournoy at 382-86.

**JORDAN**

- Revised Draft of Trans-Jordan Nationality Law of 1 May 1928, art. 6 (in effect in 1940) (Jordan), *reprinted in* Laws Concerning Nationality at 274-76.

**KOREA**

- Nationality Law No. 16 of 20 December 1948 (Korea), *reprinted in* Laws Concerning Nationality at 280-83.

**KUWAIT**

- Nationality Law, 1959, arts. 2-3, 5 (Kuwait), *available at* http://www.unhcr.org/refworld/docid/3ae6b4ef1c.html.

**LEBANON**

- Legislative Decree 15 of 19 Jan 1925 (nationality), arts. 1-2 (Leb.), *available at* http://www.unhcr.org/refworld/docid/44a24c6c4.html.

**LIBERIA**

- Law of February 8, 1922, § 67 (Liber.), *reprinted in* Flournoy at 413-15.

**LIBYA**

- Law No. 1013, of June 26, 1927 Regarding Italian Lybian Citizenship, art. 29 (in effect in 1940) (Italian Lybia/Libya), *reprinted in* Flournoy at 379-80.

**MAURITANIA**

- Loi N° 1961-112, Loi portant code de la nationalité mauritanienne, art. 13 (Mauritania), 13 June 1961, *available at* http://www.unhcr.org/refworld/docid/3ae6b5304.html.

**MEXICO**

- Constitución Política de los Estados Unidos Mexicanos [Political Constitution of the United Mexican States], art. 30, *as amended* 1934, Diaro Oficial de la Federación, 5 de Febrero de 1917 (Mex.), *reprinted in* Laws Concerning Nationality at 307.

**NEPAL**

- Nepalese Citizenship Act 2009 V.S., 1952 (Nepal), *reprinted in* Laws Concerning Nationality at 320-21.

**THE NETHERLANDS (including Aruba and Suriname in 1940)**

- *Compare* 1892 Dutch Nationality Act, arts. 1-2 (as amended 1920) (Neth.), *reprinted in* Flournoy at 440-46, *and* 1892 Dutch Nationality Act, arts. 1-2 (as amended 1947) (Neth.), *reprinted in* Laws Concerning Nationality at 321-26, *discussed in* Bauböck 2007 at 393-95.

**NEW ZEALAND**

- British Nationality and Status of Aliens (in New Zealand) Act, 1928, 19 Geo. 5, c. 58, § 6, sched. 2, *reprinted in* Flournoy at 104-15, *discussed in* Jones at 270-71.

**OMAN**

- Omani Nationality Law No. 3/83 (as amended), 1983, art. 1, *discussed in* CERD Oman at 16.

**PAKISTAN**

- Pakistan Citizenship Act, No. II, of 13 April 1951, ¶ 5, *reprinted in* Laws Concerning Nationality at 361-66.
- Sik at 69-70 (explaining applicability of U.K. law in 1940); Jones at 114, 232-35, 286-87 (same).

**QATAR**

- Qatari Citizenship Act No. 38 of 2005, arts. 1-2, *discussed in* Parolin at 96-100; *discussed in* Breslin at 400; *discussed in* State Department Qatar.

**ROMANIA**

- Law of February 23, 1924, arts. 2, 36(b) (Rom.), *reprinted in* Flournoy at 497-508, *discussed in* Bauböck 2009 at 180-81 (noting that although a new citizenship law was passed in 1939 it "did not alter the main principles of ascribing citizenship").

**SAUDI ARABIA**

- Saudi Arabian Nationality Regulations, Council of Ministers Res. No. (4), 25/1/1374 (Sept. 23, 1954), arts. 7-8, *as amended by* Res. No. 210, 7/11/1379 (1959) (in effect in 2010) (Saudi Arabia), *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83623/92465/F2086231767/SAU83623.pdf.

**SOMALIA**

- Transitional Federal Charter for the Somali Republic, Feb. 2004, art. 10, *available at* http://www.unhcr.org/refworld/docid/4795c2d22.html.

**SOUTH AFRICA**

- Act No. 40, of November 11, 1927, ch. 1 (S. Afr.), *reprinted in* Flournoy at 127-29.

**SUDAN**

- Sudanese Nationality Act 1994, ch. 2 (last amended 2011), *available at* http://www.refworld.org/docid/503492892.html.

**SWAZILAND**

- Citizenships Order, 1974, Apr. 12, 1973, §§ 4-5 (Swaz.), *available at* http://www.unhcr.org/refworld/docid/3ae6b4fa20.html.
- Constitution of the Kingdom of Swaziland Act 2005, ch. 4, § 43 (in effect in 2010), *available at* http://aceproject.org/ero-en/regions/africa/SZ/CONSTITUTION%20OF%20THE%20KINGDOM%20OF%20SWAZILAND%202005.pdf.

**SYRIA**

- Nationality Act, Dec. No. 276/1969, art. 3, Nov. 24, 1969 (Syria), *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83625/92467/F153006838/SYR83625.pdf, *discussed in* Parolin at 96-99.

**TAIWAN**

- Nationality Act of 5 February 1929, chs. 1-3 (in force in China pre-1949, in force solely in Taiwan post-1949) (Taiwan), *reprinted in* Laws Concerning Nationality at 94-97, *explained in* Sik at 35-40.

**THAILAND**

- Nationality Act B.E. 2456 (1913) (Thail.), *explained in* Sik at 463-64.

**TOGO**

- Loi sur la nationalité togolaise, Sept. 11, 1978, art. 3 (Togo), *available at* http://www.unhcr.org/refworld/docid/3ae6b4d02c.html, *discussed in* Manby at 5.

**UNITED ARAB EMIRATES**

- Federal Act No. 17 of 1972, arts. 2, 17 (U.A.E.), *available at* http://www.lexismiddleeast.com/files/353289/9801I_LN_1972-11 18_00017_FL_En.pdf, *discussed in* CEDAW UAE at 39.

**UNITED KINGDOM [Including the colonies and territories in 1940 which now comprise the Bahamas, Barbados, Belize, Bermuda, Botswana, British Virgin Islands, Cayman Islands, Gambia, Ghana, Guyana, Hong Kong, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Malta, Mauritius, Nigeria, Palestine, Seychelles, Sierra Leone, Singapore, Sudan, Swaziland, Tanzania, Trinidad & Tobago, Uganda, Zambia, and Zimbabwe]**

- Nationality & Status of Aliens Act, 1914, 4 & 5 Geo. 5, c. 17, § 1 (U.K.), *reprinted in* Flournoy at 61-72, *discussed in* Jones at 113-57.

- Jones at 114, 232-35, 268-87 (discussing application of British Nationality & Status of Aliens Act to British Commonwealth colonies and territories); *see also* Fransman at 467-993 (discussing the colonial status of each of the British Commonwealth colonies and territories).

**VIETNAM**

- Code civil du Tonkin de 1931 (Vietnam), *reprinted in* Laws Concerning Nationality at 549-50.

**YEMEN**

- Law No. 6 of 1990 Concerning Yemeni Nationality, arts. 3-4, *available at* http://www.refworld.org/docid/3ae6b57b10.html (in effect in 2010).